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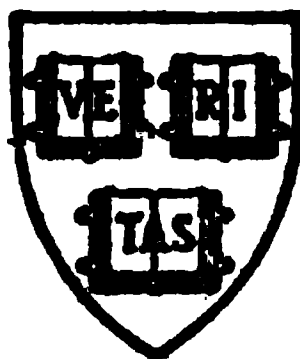
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MONTANA REPORTS.

VOLUME IX.

Oct 14

37

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
MONTANA TERRITORY,
AT
THE JULY TERM, 1889,
AND ALSO OF THE
STATE OF MONTANA,
AT
THE JANUARY AND APRIL TERMS, 1890.

By
FLETCHER MADDUX,
REPORTER.

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Dec. 1, 1890

JUDGES
OF
THE SUPREME COURT OF THE TERRITORY OF MONTANA

DURING THE TIME OF THESE REPORTS

HON. HENRY N. BLAKE, Chief Justice.

HON. THOMAS C. BACH,
HON. STEPHEN DE WOLFE, } **Associate Justices.**
HON. MOSES J. LIDDELL,

OFFICERS OF THE COURT.

JOHN B. CLAYBERG, Attorney-General.

ELBERT D. WEED, United States District Attorney.

GEORGE W. IRVIN, United States Marshal.

ROBERT L. WORD, Clerk.

HORACE R. BUCK, Reporter.

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THE SUPREME COURT OF THE STATE OF MONTANA

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HON. WILLIAM H. DE WITT, } **Associate Justices.**
HON. EDGAR N. HARWOOD,

OFFICERS OF THE COURT.

HENRI J. HASKELL, Attorney-General.

W. J. KENNEDY, Clerk.

FLETCHER MADDOX, Reporter.

The Territory was admitted into the Union as a State, November 8, 1889. The July term, 1889, was the last term held by the Territorial Supreme Court, and on the fifth day of October, 1889, the Supreme Court of the Territory of Montana adjourned *sine die*.

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JUDGES AND JUDICIAL DISTRICTS.

The First Judicial District embraces the County of Lewis and Clarke; WILLIAM H. HUNT, Judge; residing at Helena.

The Second Judicial District embraces the County of Silver Bow; JOHN J. MCHATTON, Judge; residing at Butte.

The Third Judicial District embraces the County of Deer Lodge; DAVID M. DURFEE, Judge; residing at Deer Lodge.

The Fourth Judicial District embraces the County of Missoula; C. S. MARSHALL, Judge; residing at Missoula.

The Fifth Judicial District embraces the Counties of Beaverhead, Jefferson, and Madison; THOMAS J. GALBRAITH, Judge; residing at Dillon.

The Sixth Judicial District embraces the Counties of Galatin, Park, and Meagher; FRANK HENRY, Judge; residing at Livingston.

The Seventh Judicial District embraces the Counties of Yellowstone, Custer, and Dawson; GEORGE R. MILBURN, Judge; residing at Miles City.

The Eighth Judicial District embraces the Counties of Choteau, Cascade, and Fergus; C. H. BENTON, Judge; residing at Great Falls.

JULY TERM 1889.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JULY TERM, 1889.

PRESENT:

Hon. HENRY N. BLAKE, Chief Justice.

Hon. THOMAS C. BACH,	} Associate Justices.
Hon. STEPHEN DE WOLFE,	
Hon. MOSES J. LIDDELL,	

TERRITORY OF MONTANA, RESPONDENT, v. LANNON,
APPELLANT.

DEFACING PUBLIC NOTICE—Evidence.—Under an indictment for defacing a notice of a petition for the laying out of a county road, it is not necessary for the Territory to prove on the trial that the petition had been presented to the county commissioners, or that it was accompanied with affidavits relative to the time and place of posting the notice. (*Case of Territory v. Mackey*, 8 Mont. 168, distinguished.)

PUBLIC PLACE—Statutory construction.—Where a petition for the laying out of a county road was posted at a depot, six or seven hundred feet from the proposed road, *held*, to be a public place in the vicinity of the proposed road, within the meaning of section 1809, division 5, Compiled Statutes.

Appeal from Second Judicial District, Deer Lodge County.

The defendant was tried before DE WOLFE, J.

Cole & Whitehill, for Appellant.

John B. Clayberg, Attorney-General, for the Territory, Respondent.

BLAKE, C. J.—The appellant was indicted and convicted for defacing and obliterating a written notice in violation of the following section of the criminal laws of this Territory: "If any person shall intentionally deface or obliterate, tear or destroy, in whole or in part, any record, copy, or transcript, or extract from or of any law of the United States or of this Territory, or any proclamation, advertisement, or notification, set up at any place in this Territory by authority of any law of the United States or of this Territory, or by order of any court, such person, on conviction, shall be fined not more than one hundred dollars, nor less than twenty dollars, or be imprisoned in the county jail not more than one month; *provided*, this section shall not extend to defacing, tearing down, obliterating, or destroying any law, proclamation, publication, notification, advertisement, or order after the time for which the same was by law to remain set up shall have expired." (Comp. Stats. div. 4, § 173.) The indictment alleges, in substance, that there was posted a notice, required by law to be posted, stating that a petition would be presented to the board of commissioners of the county of Deer Lodge at their next session to have a new county road laid out; and that the appellant defaced and obliterated said notice when the time in which the law required said notice to be posted had not expired. There is no controversy respecting the facts; and it appears that the notice mentioned in the indictment was posted at the depot of the Northern Pacific Railroad Company at Bearmouth, in Deer Lodge County, and that the appellant pasted thereon a piece of paper which covered the part containing the written matter.

Was this a notification set up by authority of the law of the Territory? The act concerning roads and highways provides that, "when any petition shall be presented for the action of the county commissioners for the laying out, alteration, or vacation of any county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement posted on the front door of the county clerk's office, and in three public places in the vicinity of said road, thirty days previous to the presentation of said petition to the county commissioners. Proof of the posting of said notices, giving time and place, shall be made by affidavit, which shall be filed with said petition." (Comp.

Stats. div. 5, § 1809.) The evidence proves that the notice referred to was put up about six hundred or seven hundred feet from the west terminus of the proposed road; that copies were also posted at the middle and east end thereof, at Drummond, and on one side of the door of the office of the county clerk of Deer Lodge County. The appellant contends that no judgment of conviction can be sustained without proof establishing all the acts enumerated in the statute, *supra*; and that the Territory must show that the petition had been presented to the county commissioners regarding the laying out of said road, and that it was accompanied with affidavits relative to the time and place of posting the notices, before the instrument which was defaced can be declared a valid notification. The case of the *Territory v. Mackey*, 8 Mont. 168, is relied on by the appellant to support this proposition. The indictment in that action is based upon a statute which provides for the punishment of any person who shall "obliterate, deface, or destroy any notice placed" on a mining claim; and this court held that the existence of a lode mining claim must be shown to constitute the crime charged against the accused. But the distinction between this case and that at bar is obvious. The discovery of a vein or crevice of quartz or ore upon the unappropriated domain of the United States, and the marking of the boundaries of the lode, are conditions precedent to the posting of the notice of location on the mining claim. There must be a strict compliance with these statutory requirements. When, however, a county road is to be laid out, four notices like that which is set forth in the transcript must be posted at the places named in the statute. This is the first of a series of acts which are essential to the creation of a highway. The subsequent proceedings which must take effect prior to the opening of the road cannot affect the question of the guilt or innocence of the appellant; for all the notices had been lawfully posted at the time of the commission of the alleged offense, and the Territory was not compelled to produce further proof on this point. The form of the notice is not attacked, and we are satisfied that it was set up by authority of the law which has been cited.

The appellant maintains that the posting of the notice upon the depot at Bearmouth was not in the vicinity of the proposed

road, and was therefore illegal. The statute designates for this purpose public places in the vicinity of a highway. The meaning of the words "public place," which are found in many laws, is modified by the subjects to which they are applied. In *State v. Welch*, 88 Ind. 308, the court says: "The phrase, 'a public place' has received a construction by this court, and has been construed to mean a place where the public has a right to go and be." To the same effect are *State v. Sowers*, 52 Ind. 311; *State v. Waggoner*, 52 Ind. 481. "The term 'public,' as applied to 'place,' is not an absolute, but a relative term. . . . It is used in contradistinction to the term 'private,' and to signify that the notice was to be given in such way as would be likely to have the effect intended." (*Cuhoon v. Coe*, 57 N. H. 595.) Viewed from any standpoint, they include a station upon a railroad which has been chartered by an act of Congress. In *Langley v. Barnstead*, 63 N. H. 246, the court says: "Etymologically, and by common understanding, the phrase 'in the vicinity' means 'in the neighborhood'; and 'neighborhood,' as applied to 'place,' signifies 'nearness,' as opposed to 'remoteness.' Whether a place is in the vicinity or in the neighborhood of another place depends upon no arbitrary rule of distance or topography." The testimony discloses the fact that the proposed road connected with the main highway about six hundred or seven hundred feet from the depot at Bearmouth, and that there was no suitable place for posting the notice at that point. We conclude from the foregoing authorities that the statute of the Territory was complied with in this respect, and that the notice which was defaced and obliterated by the appellant was legally posted. The judgment is affirmed, with costs.

BACH, J., and LIDDELL, J., concur.

TERRITORY OF MONTANA, RESPONDENT, v. JAGGERS,
APPELLANT.

LARCENY—Instructions.—Where the jury were instructed that the proof must show beyond a reasonable doubt “that the steer belonged to the company as alleged in the indictment,” and in another instruction the court used the following language: “If he drove the steer in off the range, when it was the property of the corporation charged in the indictment;” *held*, that the instructions should be considered together, and that the latter instruction was clearly hypothetical and did not assume the fact of ownership.

Appeal from First Judicial District, Beaverhead County.

The defendant was tried before McCONNELL, C. J.

Campbell & Duffy, for Appellant.

John B. Clayberg, Attorney-General, for the Territory, Respondent.

BLAKE, C. J. — The appellant was convicted of the crime of grand larceny, and the court below overruled his motion for a new trial. It is claimed that the evidence “was and is insufficient in law to justify the jury in finding beyond a reasonable doubt and to a moral certainty the guilt of the defendant.” It is sufficient to state, in answer to this ambiguous objection, that the proof sustains the verdict. A review of the testimony would not be instructive, and is therefore omitted.

The appellant insists that the court erred in giving to the jury an instruction, using the following language in referring to the appellant: If he “drove the steer in off the range, when it was the property of the corporation charged in the indictment,” the legal effect was stated. Counsel contend that this instruction assumed the fact of ownership, and thereby usurped the function of the jury. All the instructions should be considered to determine this alleged error, and the court had already instructed the jury that, among other things constituting the alleged offense, the proof must show beyond a reasonable doubt “that the steer belonged to the company as alleged in the indictment.” The observation which is criticised is clearly hypothetical, and we are satisfied that no rights of the appellant were prejudiced. It is also asserted that another instruction

is "erroneous." No reasons are offered and no authorities are cited to uphold this statement, which will not be further noticed.

It is urged by the appellant that the court erred in admitting the testimony of two witnesses, McKay and Smith, concerning the acts of his co-defendant, Pendry, in his absence. An examination of the evidence shows that the accused and Pendry acted together in the commission of the crime for which they were jointly indicted, and that no testimony of the character complained of was received upon the trial. The judgment is affirmed, and the original judgment will be carried into execution as entered in the court below. All concur.



TERRITORY OF MONTANA, APPELLANT, v. STOCKER, RESPONDENT.

CRIMINAL LAW — *Former jeopardy.* — The plea of a former conviction will not be sustained under an indictment for an assault with a deadly weapon, with intent to inflict upon the person of another bodily harm, upon the proof of the conviction of the defendant in a Justice's Court, under the charge of exhibiting a deadly weapon in the presence of one or more persons in a rude, angry, or threatening manner, not in necessary self-defense, the two prosecutions being based upon the same act of the defendant.

CRIMINAL EVIDENCE — *Lost instrument.* — The contents of a lost instrument, as a criminal complaint, may be proved by oral testimony, where the foundation for the introduction of such testimony is sufficiently laid.

SAME — *Former conviction — Variance in the testimony.* — Under a plea of former conviction the question is as to the identity of the two offenses for which the defendant was prosecuted; and a variance in the testimony, as to who made the complaint in the first trial, is immaterial.

CRIMINAL PRACTICE — *Appeal.* — The Territory has the right of appeal from an order sustaining the plea of a former conviction, where there is no dispute as to the facts which are offered in support of the plea.

SAME — *Successive prosecutions.* — Successive prosecutions of an accused for offenses growing out of the same transaction is a matter which addresses itself to the sound discretion of the prosecuting attorney, who should be governed by the circumstances.

Appeal from Second Judicial District, Silver Bow County.

The defendant was tried before DE WOLFE, J., without a jury. The Territory appeals from an order sustaining the plea of a former conviction.

9	6
18	401
22*	496
34*	180
9	6
14	403
22*	496
36*	815

John B. Clayberg, Attorney-General, and *William H. De Witt*, of counsel, for Appellant.

The defendant was indicted for an assault with a deadly weapon. He plead in bar to the indictment a conviction for exhibiting a deadly weapon in a rude, or angry, or threatening manner.

The indictment is for felony. The plea is of a conviction for a misdemeanor in the court of a justice of the peace. The Justice's Court had no jurisdiction to try a felony, as is the offense charged in the indictment: therefore no conviction had in such court, where there was no jurisdiction, would be a bar to this indictment for a felony. (*State v. Nichols*, 38 Ark. 550.)

One of the tests of the validity of the plea *autrefois convict* depends on whether the defendant has before been in danger of conviction of the offense of which he stands charged. In the case at bar he has not, for he has never been tried in a court having jurisdiction of the offense charged in the indictment.

An assault with a deadly weapon, with intent to do bodily injury, can be made (as with fire arms) at a distance, and not in the presence of any person, and not in a rude or threatening manner. In fact, the evidence necessary to support one charge is not in any respect required upon the prosecution of the other.

The proposition at bar is *res adjudicata* in this court. (*Territory v. Fox*, 3 Mont. 440; *Territory v. Willard*, 8 Mont. 328.)

William Scallon, for Respondent.

The Territory has no appeal on any mixed question of law and fact. (*Territory v. Laun*, 8 Mont. 322.) Therefore, it is only by confessing that the present prosecution is, in the words of the concluding sentences of the bill of exceptions, for the very same "acts and facts" as the prior one, that appellant can have any standing at all in this court. And, if it be for the very same act and fact, how can it be claimed that the defendant has not already been in jeopardy. The defendant relies as well upon the constitutional prohibition of the fifth amendment, as on the "former conviction" rule. We claim that it is the "act and the fact" which constitute "the offense," and not the various names that may be given to the act by the prosecution, or

the various charges that may be framed upon one act. (1 Bishop on Criminal Law [7th ed.], §§ 1057, 1058, 1060; Wharton's Criminal Pleading and Practice, § 465.) The constitutional provision applies with equal force to misdemeanors as to felonies. (1 Bishop on Criminal Law, §§ 990, 991, and cases cited.)

As to the point that the plea is not good because a Justice's Court had no jurisdiction of a felony, Bishop disposes of it thus: "It has been supposed that if the tribunal trying the less offense has no jurisdiction over the higher, the case will be different; yet there does not seem to be any just foundation for this distinction." (Vol. 1, § 1058.)

Charging a felony does not make a felony. Here the evidence and the decision of the court, which must be held conclusive according to *Territory v. Laun*, shows that there was no felony committed.

It is not, as claimed by the appellant, the abstract or theoretical identity in the nature of the offenses, or the facts constituting them, which controls, but the practical similarity of the evidence and of the actual facts in the particular case. In other words, the expression, "the evidence necessary to sustain the second indictment would have been sufficient to procure a legal conviction upon the first," must be taken to mean the evidence necessary and sufficient in the particular case, and not the evidence that would be necessary or sufficient in any case. And that if in the particular case it happens that the evidence necessary on the second would have been sufficient to sustain the first charge, this brings it within the rule. (Cooley's Constitutional Limitations [1st ed.], p. 328, and cases cited.)

LIDDELL, J.—The defendant was indicted for an assault with a dangerous weapon, to wit, a pistol, with intent to inflict a bodily injury upon the person of another. Upon arraignment, he plead in bar a former conviction, and that he had once been in jeopardy for the same acts and offenses set forth in the indictment. The matter was tried before the court without a jury; and from an order sustaining the plea, and discharging the defendant, the Territory duly excepted, and appeals the case to this court.

In the case of the *Territory v. Laun*, 8 Mont. 328, we held that no appeal would be allowed from a question of fact and

law within the discretion of the trial judge; that is, when there were two lines of fact, one of which was to be selected by the judge as representing the truth, as when there was a dispute as to what were the true facts, then it became necessary for the exercise of judicial discretion, and the Territory had no right to appeal from his ruling. In the present case there was no dispute whatever as to the facts which are offered in support of the plea, so the case does not fall within the rule laid down in the *Territory v. Laun*, as is contended by counsel for defendant.

The case is before us upon a bill of exceptions, properly settled and signed, presenting only two questions—one as to the admissibility of evidence offered to sustain the plea, and the other as to the correctness of the ruling of the trial judge in sustaining the same, and discharging the accused.

While in a Butte saloon, the accused became engaged in an altercation with the saloon-keeper, and drew his pistol; but it does not appear that he used it in any manner other than to display it in the presence of one or more persons in an angry, rude, and threatening manner. On the day following, he was arrested on a warrant from a magistrate's court, prosecuted and convicted of the offense of drawing and exhibiting a deadly weapon in the presence of others in a rude, angry, and threatening manner, and paid his fine. Afterwards, when the grand jury convened, he was indicted for an assault with a dangerous weapon, to wit, a pistol, and with intent to inflict upon the person of Fulk, the saloon-keeper, a bodily injury.

In proving the prior prosecution, it became necessary to show the arrest, charge, trial, conviction, and sentence of the magistrate's court; and to this end the magistrate before whom the trial took place was introduced as a witness on behalf of the defense. The record of his court was offered in evidence, and clearly shows the trial, charge, plea, sentence, and payment of fine by the defendant; but the affidavit or complaint of the deputy-sheriff was in some way lost, and the magistrate testified to the officer having made the complaint, its contents, and that it was sworn to before him, and that he had searched diligently for the complaint, but that it could not be found. The counsel for the Territory objected to the introduction of this oral testimony, but he has referred us to no law for its exclusion. The

trial judge correctly overruled the objection, for the foundation had been sufficiently laid to prove the contents of the lost instrument. (Wharton's Criminal Pleading and Practice, § 481.)

The next objection was to the introduction of the magistrate's docket in the case of the *Territory v. Stocker*, on the ground that the docket shows the charge to have been made by one Fulk, whereas the magistrate had testified that the deputy-sheriff Fish had made the complaint upon which the defendant was arrested. This error was explained by the magistrate; Fulk having made the charge upon which the defendant was held to await the action of the grand jury, while the deputy-sheriff made the complaint upon which he was tried before the magistrate. There was no force in the objection, for it was immaterial who made the complaint; the question being as to the identity of the two offenses for which he was prosecuted.

Several rules are laid down by which the plea of former conviction and jeopardy may be tested, but we are unable to find any which would sustain the plea in the present case. While being prosecuted in the magistrate's court for displaying a deadly weapon in a rude, angry, and threatening manner in the presence of others, the defendant was never in any danger of being convicted of an assault with a deadly weapon with intent to inflict bodily harm. Nor would the evidence to convict of the offense of displaying a deadly weapon in a rude, angry, and threatening manner necessarily convict of the crime charged in the indictment. The assault may have been made without any display of the weapon in the presence of another, and the display of the weapon might be made without an intention to assault or do bodily harm. It is obvious that the two offenses are not generic, and an assault with a deadly weapon with intent to do bodily injury does not necessarily include the offense of displaying a deadly weapon in the presence of one or more persons in a rude, angry, and threatening manner, and not necessarily in self-defense. The evidence of the major would not necessarily sustain a prosecution for the minor offense.

It frequently happens that several offenses are included in a single affair or crime. For instance, in the present case, it is entirely possible that the defendant may not only have displayed his pistol in the presence of others in a rude, angry, and threat-

ening manner, but he may have been guilty of carrying concealed weapons, and of an assault, and also of an assault and battery, as well as an assault with a deadly weapon with intent to do bodily harm. Now, upon a prosecution for the latter crime, he may have been convicted of an assault, but not of a battery. (*Territory v. Dooley*, 4 Mont. 295.) But we are unable to perceive how either carrying concealed weapons, or displaying them in a rude, angry, and threatening manner in the presence of one or more persons, is necessarily included in the crime of an assault with a deadly weapon with intent to inflict bodily injury upon the person of another.

By the law of the Territory, an indictment must charge but one offense, and the jury is authorized to find the defendant guilty of any degree inferior to that charged in the indictment, or an attempt to commit the same, or of any offense necessarily included in the crime charged. We find this question under consideration in the case of the *Territory v. Willard*, 8 Mont. 328, and we there held that section 313 of the Criminal Practice Act carried with it the implied permission to prosecute for any offense not necessarily included in a former charge.

Whether it is a proper practice to harass and annoy the accused by successive prosecutions for offenses growing out of the same transaction is a matter which addresses itself to the sound discretion of the prosecuting attorney, who will be governed by the circumstances. But it may be doubted whether, in these minor offenses, the interest of the public is best served by such a course.

The order sustaining the plea, and discharging the defendant, is reversed, at cost of respondent.

BLAKE, C. J., and BACH, J., concur.

9	12
15	482
15	558
23*	132
39*	457
39*	848

TERRITORY OF MONTANA, RESPONDENT, v. ROBERTS, APPELLANT.

HOMICIDE — Continuance — Character. — There is no abuse of discretion in refusing a motion for a continuance upon the ground of absent witnesses, whose testimony was required for the purpose of proving that in 1844 the defendant was afflicted with disease which sometimes produced mental trouble; that from 1861 to 1864 he was in the military service of the United States, and was wounded; and that in 1863 and 1864 his reputation for peace and quietness in the community in which he then lived was good.

PRACTICE — Challenge to juror. — Where a challenge by the Territory to a juror was improperly sustained, but it appeared that "a jury of good and lawful men was sworn to try the case." *Held*, that the defendant was not injured by the exclusion of the juror, and such exclusion was no ground for a new trial.

HOMICIDE — Threats against the deceased. — Where a witness testified as to threats made by the defendant against the deceased two months before the shooting, which were objected to as being too remote; *held*, that the mere lapse of time does not exclude the evidence of threats which have a direct relation to the case, as no rule of limitation runs against evidence as to malice in cases of homicide.

SAME — Insanity — Evidence. — Where it appeared that certain witnesses who testified to the sanity or insanity of the defendant were laymen, and gave as a reason for their opinion that they were well acquainted with the defendant, and had observed his conduct during the period in regard to which they testified. *Held*, that the testimony was competent.

PRACTICE — Contents of record. — Where the record contains no testimony to guide the court in determining the propriety of an instruction, which is correct in the abstract, no error will be presumed.

BRIEFS. — The failure of attorneys to file briefs on an appeal from a conviction of murder in the first degree, criticised and disapproved.

Appeal from Second Judicial District, Silver Bow County.

The defendant was tried before DE WOLFE, J.

No briefs on file.

BLAKE, C. J. — The appellant was convicted of the crime of murder in the first degree, and this appeal has been taken from the judgment of the court below and the order overruling the motion for a new trial. No briefs have been filed, and no arguments have been made in this action, and we would be justified by many precedents in affirming the judgment without any examination of the transcript. This court has expressed its disapproval of similar conduct upon the part of counsel for appellants; and, while we do not desire to act as censors, we hope that this is the last time that we shall be called upon to comment on the omission of attorneys to perform their impor-

tant duties. The gravity of the offense demands a careful investigation, although we are embarrassed by our ignorance of the real grounds for taking this appeal. There is no specification of errors, but the first reason in the motion for a new trial is "that the evidence did not or does not establish beyond a reasonable doubt the guilt of the defendant." The second is contained in different language, which has the same legal effect. The testimony has not been embodied in the record, and these grounds cannot be considered at this time.

The alleged errors of law will be reviewed in their order. It appears that the appellant moved May 22, 1889, for a continuance of the action until the succeeding term, and alleged that he could not obtain a fair and impartial trial on account of the prejudice and hostility of the community. Five days afterwards the appellant filed another motion of this character, and specified, among other witnesses, Generals Sherman, Hunter, and Hall, for the purpose of proving that in 1844 he was afflicted with disease—fainting spells and nervous prostration—which sometimes produced mental troubles; that from 1861 to 1864 he was in the military service of the United States, and was wounded, and suffered from these attacks of illness, and that the said Hall and Sherman were well acquainted in 1863 and 1864 with his reputation for "peace and quietness in the community in which he then lived, and that the same was good." No other periods of time are mentioned in the affidavits. The motions were overruled. It is difficult, in the absence of the evidence, to determine how such facts, if testified to, could be material or relevant; but the law governing the ruling of the court below is established in this Territory. There has been no abuse of judicial discretion in refusing the motions, and the judgment cannot be disturbed. (*Territory v. Perkins*, 2 Mont. 471, and cases cited; *Territory v. Harding*, 6 Mont. 332.)

It is also claimed that "the court erred in sustaining the challenge of the prosecution to the juror, Renfry." This person was examined on his *voir dire*, and testified that he was not a citizen of the United States; that he had declared his intention to become a citizen; that he had heard rumors about the case; that he could not tell whether the parties he heard talk were witnesses; and that he had formed an opinion as to the guilt or

innocence of the defendant. He was challenged by the Territory "on the ground of alienage, and for the further reason that he had stated that he had formed an opinion as to the guilt or innocence of the defendant." The challenge was resisted by the appellant, and sustained by the court. A jury of good and lawful men was sworn to try the case, and no other facts in relation to the matter are shown by the transcript. In *Hayes v. Missouri*, 120 U. S. 71, Mr. Justice Field, in the opinion of the court, says: "The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. (*Northern Pacific R. R. v. Herbert*, 116 U. S. 642.) The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." This was followed in *Hopt v. Utah*, 120 U. S. 430, and *Spies v. Illinois*, 123 U. S. 168. The appellant was not injured by the exclusion of the juror.

Another ground appearing in the motion for a new trial is that "the court erred in allowing the witness, William H. Le Duc, to testify as to what the defendant told said witness two months before the date of the alleged commission of the crime charged in the indictment." The record states that the witness testified as follows: "I heard the defendant speak about this matter somewhere about two months before the shooting occurred. I heard him make threats against the deceased." *Question*. "What did he say?" The appellant objected to this testimony as being too remote to be connected with the act described in the indictment. The objection was overruled, but the answer is not given, and its materiality or relevancy cannot be demonstrated in the ordinary mode. Assuming that it was prejudicial to the appellant, the authorities are uniform that mere lapse of time does not exclude the evidence of threats, which have a direct relation to the case. In *Everett v. Georgia*, 62 Ga. 65, it is held that the evidence of threats, uttered by the accused against the deceased about three years before the commission of the crime of murder, is admissible. In *Redd v. State*, 68 Ala. 492, threats of this nature, made through a period of two years prior to the alleged criminal act, were declared relevant. In *State v. Hoyt*, 46 Conn. 330, the court says: "As tending to prove malice on the part of the accused towards his victim at the time

of the homicide, the State offered evidence tending to prove that thirteen years since he had said that 'he would like to put a ball through his father's heart, if he thought it would penetrate, but his heart was so much harder than the ball that he thought it would not penetrate it.' This was received against the objection that it was too remote in time, and was followed by evidence as to the threats made one, three, and four years since. The objection does not properly go to the admission, but to the weight, of the testimony. No rule of limitation runs against evidence as to malice in such cases."

The next ground is that "the court erred in refusing to permit counsel for defendant to read to the jury the medical works offered in evidence, or to read the portions of said works referred to in the offer of defendant." This alleged error is refuted by reading the following extract from the transcript: "In the matter of the reading of the work, 'Hammond on Insanity,' the court ruled 'that the counsel for defendant might read in evidence to the jury all of said work that they offered to read as aforesaid,' and that the defendant closed the case without reading said book, or any part thereof, or offering so to do."

It is then alleged that the court erred in allowing witnesses "to testify to the sanity or insanity of the defendant." It appears that three witnesses were "laymen," and "gave as a reason for their opinion that they were well acquainted with the defendant, and had observed his conduct during the period in regard to which they testified." The proposition controlling this question has been settled in *Territory v. Hart*, 7 Mont. 489, where the authorities are collated by Mr. Justice McLeary, and it will be readily seen that these witnesses are competent.

The last grounds in the motion relate to the instructions which were given or refused. The court gave seventeen instructions of its own motion, and eight instructions at the request of the appellant. Only one of them has been complained of, and that refers to the subject of the character of the defendant, upon which it is asserted that evidence had been introduced by both parties. Eight instructions embrace the law of insanity as a defense to crimes, and ten instructions upon this question were refused. We have no testimony to guide us in this inquiry, but, viewing abstractly the legal problems presented, we say without any

hesitation that there is no error in the action of the court below. A discussion of all the instructions, under the peculiar circumstances of this case, is not required, and will not be undertaken. The judgment is affirmed, and the original judgment is hereby directed to be carried into execution as entered in the court below.

BACH, J., and LIDDELL, J., concur.

TERRITORY OF MONTANA, RESPONDENT, v. CAMPBELL, APPELLANT.

9	16
26	56
9	16
27	340

CRIMINAL LAW — Practice. — Contents of record. — An exception taken to the ruling of the trial judge, excluding a question propounded by defendant to a juror on his *voir dire*, will not be considered by this court unless the record shows affirmatively that such juror was sworn and served, and that the defendant's peremptory challenges were exhausted before the jury was finally impaneled.

EVIDENCE — Res gestæ. — Where the evidence shows a *prima facie* case of conspiracy between parties to commit a crime, whatever is said by either of such parties at the time of the commission of the act complained of is part of the *res gestæ* and admissible in evidence.

SAME — Former enmity. — It is not error to refuse to allow the defendants to ask the wife of the prosecuting witness, whether there was not a good deal of enmity existing between her husband and one D, as such a state of feeling could have no bearing upon the guilt or innocence of the accused, much less as to how the witness felt towards the defendant.

SAME — Previous threats. — Proof of threats, made by the prosecuting witness against the life of the defendant, and communicated to him, is inadmissible as a defense, unless, at the time of the perpetration of the crime, the prosecuting witness indicated by his conduct an intention to carry them into execution.

Appeal from Second Judicial District, Deer Lodge County.

The defendant was tried before DE WOLFE, J.

Robinson & Stapleton, for Appellant.

The court erred in the selection of jurors in this cause in not permitting counsel for the defendant to ask juror Batterton "whether he had any knowledge of the feuds existing for two or three years past between the Dooley and Milroy families," for the purpose of aiding them in an intelligent exercise of the right of peremptory challenge. (Proffatt on Jury Trial, 207, § 155; *Watson v. Whitney*, 23 Cal. 376; *People v. Car Soy*, 57

Cal. 102.) And also for the purpose of testing the mind of the juror as to his opinion on the merits of the controversy, and his prejudice in the matter from facts learned previous to the trial. (*People v. Reyes*, 5 Cal. 347; *Nelms v. Mississippi*, 13 Smedes & 500; M. 53 Am. Dec. 94; *People v. Gehr*, 8 Cal. 359.)

Proof by the prosecution of statements made by Dooley and others at the time of the difficulty was inadmissible, without first proving the existence of an understanding or conspiracy between them and defendant to join effort in a common fight. (*State v. McNamara*, 3 Nev. 60; *Brainard v. Buck*, 25 Vt. 573; 60 Am. Dec. 291; *Lawson v. State*, 20 Ala. 65; 56 Am. Dec. 182; 1 Greenleaf on Evidence, § 197.)

The court erred upon the trial of the cause in not permitting defendant's counsel to show the *animus* of Mrs. Milroy and other witnesses for the prosecution by questioning them as to pre-existing feud between Dooley and Milroy, in which Campbell had become involved. Proof of special acts of provocation on the part of Milroy towards Dooley and defendant should have been permitted. (Wharton's Criminal Law, § 1027.)

John B. Clayberg, Attorney-General, for the Territory.

There is nothing in the record to show that the defendant had exhausted any of the peremptory challenges at the time these questions were overruled, and if his counsel thought either of the jurors were prejudiced or partial, he could have protected himself by the exercise of his peremptory challenges. It has been frequently decided that where a challenge for cause is erroneously overruled, and the record does not show that the defendant's peremptory challenges were exhausted, the Supreme Court will not reverse the case. (*Bohanan v. State*, 15 Neb. 209; *Curran v. Percival*, 21 Neb. 434; *Burnett v. Railroad Co.* 16 Neb. 332; *Anderson v. Territory*, N. M. Jan. 28, 1887, 13 Pac. Rep. 21; *State v. Jones*, 39 La. An. 935; *State v. Gooch*, 94 N. C. 1021; *Wilson v. People*, 94 Ill. 299; *Power v. State*, 23 Tex. App. 42.) It has also been frequently held that where a challenge for cause is erroneously overruled, and the defendant then challenge the same juror peremptorily, the Supreme Court will not consider the error unless defendant's peremptory challenges were thereby exhausted, and the prejudiced or partial juror

was forced upon the defendant. (*State v. George*, 62 Iowa, 682; *State v. Elliot*, 45 Iowa, 486; *State v. Davis*, 41 Iowa, 311; *Barnes v. Town of Newton*, 46 Iowa, 567; *Sullings v. Shakespeare*, 46 Mich. 408; *People v. Gatewood*, 20 Cal. 147; *People v. Gaunt*, 23 Cal. 156; *Robinson v. Randall*, 32 Ill. 521; *People v. McGungill*, 41 Cal. 429; *Baldwin v. People*, Tex. App. Mar. 9, 1887, 4 S. W. Rep. 579; *Ford v. Umatilla*, 15 Or. 313; *Carter v. Territory*, Wyom. June 14, 1888, 18 Pac. Rep. 750.)

The testimony as to what was said by one Dooley, at the time the crime was committed, was competent as part of the *res gestæ*. It was a part of the history of the occurrence as much as the acts of any of the parties present. (*Dismukes v. The State*, 83 Ala. 287, and cases cited.)

The testimony as to the relations of Milroy with one Dooley was properly excluded as having no bearing on the case. It certainly is no matter what the feeling may have been between Milroy and Dooley, and it did not even tend to affect the credibility of the witness.

There is no evidence in the transcript which would indicate that the prosecuting witness, or any of his party, was armed, or that the prosecuting witness was in the act of carrying into effect any threat which he might have theretofore made. Even in cases of homicide threats of the deceased are inadmissible, unless the testimony shows that at the time of the killing the deceased was making some demonstration towards the accomplishment of his threats. (*Evans v. The State*, 44 Miss. 762; *Head v. The State*, 44 Miss. 731; *Pinny v. The State*, 2 Head, 217.)

It has also been held that if there was cooling time between the acquirement of the knowledge of the threat and the commission of the crime, evidence of such threats would be inadmissible. (*State v. Jackson*, 17 Mo. 544; 59 Am. Dec. 281, and cases cited.)

LIDDELL, J.—The defendant was convicted of the crime of an assault with intent to commit murder, and has been sentenced to serve a term of five years in the territorial prison. In his appeal he complains of several erroneous rulings by the lower court, which were prejudicial to his rights; but, after an examination of the authorities relied on, we are unable to agree with his counsel that any exception was well taken.

It is very true that counsel for the defense should be permitted to thoroughly examine the juror on his *voir dire*, in order to show his bias or prejudice, and to decide whether he will exercise one of his peremptory challenges; but, whenever there is a doubt as to the propriety of the question propounded, it is always better to allow it. We are inclined to think that the questions propounded to the two jurors, Beckstead and Batterton, as to whether they knew of the feuds existing between the Milroys and Dooleys, into which the defendant had been drawn, and whether they had taken sides therein, were proper, and should have been allowed. But in the present condition of the record we cannot consider the exception, for it does not appear that either of the persons named were ever sworn or served as jurors, nor is it anywhere stated that the defendant's peremptory challenges were exhausted before the jury was finally impaneled. Unless these facts appear there is no error prejudicial to the accused, and the record should show them affirmatively in order to have the exception considered by this court. (*People v. McGungill*, 41 Cal. 429; *Ford v. Umatilla*, 15 Or. 313; *Carter v. Territory*, Wyom. June 14, 1888; 18 Pac. Rep. 750; *State v. Bunker*, 14 La. An. 461.)

The prosecuting witness, Milroy, and one Dooley reside on adjoining farms, and on the morning of the trouble he saw Dooley, Blair, King, the defendant Campbell, and Orenoe Shaud standing at Dooley's stables, where they seemed engaged in getting guns out of the house, and were firing them off in the direction where the witness was occupied in erecting a division fence between his and Dooley's farm. Shortly afterwards Dooley came up with the foregoing party, all armed, and, claiming the land as his, objected to the fence being built. The prosecuting witness protested against Dooley's taking the law into his own hands after this fashion, whereupon the latter immediately began firing upon Milroy, and called out: "Fire, boys!" which command was obeyed by the defendant, who deliberately fired four shots at the prosecuting witness, striking him once in the left knee. Counsel for defendant objected to what Dooley said at the time being received in evidence, but the court, we think, correctly overruled the objection, as it was evidently a part of the *res gestæ*. The party had deliberately armed themselves and

gone to where Milroy was engaged in building his fence. Dooley was the spokesman and commander, and directed the firing by the others. From this statement it is evident that whatever Dooley or any of the firing party said on this occasion was admissible in evidence as a part of the *res gestæ*. It is always very difficult to lay down any precise rule as to what constitutes the "*res gestæ*" of the transaction, but whenever the acts or declarations are concomitant with the principal act complained of, and evidently not made from design, then the act or declaration is admissible. And in the present instance we are not prepared to say that a *prima facie* case of conspiracy had not been sufficiently established to justify the admission in evidence of Dooley's declarations. (1 Greenleaf on Evidence, §§ 108-110; *Dismukes v. State*, 83 Ala. 287; *State v. Moore*, 38 La. An. 66.)

The next objection reserved by the defendant was to the refusal of the judge to allow defendant's counsel to ask the witness, Anna Milroy, if there was not a good deal of enmity existing between her husband and one Dooley. Whether such a state of feeling actually existed between those two individuals could have no bearing upon the guilt or innocence of the accused; much less as to how the witness felt towards the defendant, James Campbell. It is not disputed that in cross-examination the witness may be interrogated as to his interests, bias, or prejudice; but it is equally well settled that a witness cannot be cross-examined or contradicted as to any part which is collateral or irrelevant to the matter in dispute. Such evidence embarrasses the trial and distracts the attention of the jury by interjecting into the case issues which are entirely foreign to the real points submitted for decision.

Finally, the defendant contends that the court erred in refusing to allow him to prove certain threats which Milroy had made against the life of the defendant, and which had been communicated to him. It is elementary that such evidence is wholly inadmissible as a defense, unless at the time of the perpetration of the crime the person making the threats indicated by his conduct an intention to carry them into execution. The evidence in the case for the prosecution completely refutes any such condition, but, on the contrary, shows that the shooting was wan-

ton, deliberate, and malicious, and that the prosecuting witness on this occasion did everything possible to avoid being killed by the defendant. (2 Bishop's Criminal Procedure, §§ 619, 620; *Evans v. People*, 44 Miss. 762; *Head v. State*, 44 Miss. 731; *Johnson v. State*, 27 Tex. 758.) We find no error in the judgment appealed from, which is therefore affirmed at cost of appellant, and it is ordered to be carried into execution according to the terms thereof.

BLAKE, C. J., and BACH, J., concur.

TERRITORY OF MONTANA, RESPONDENT, v. JOHNSON, APPELLANT.

CRIMINAL LAW—*Instruction requiring jury to designate degree of murder.*—An instruction which is a verbatim copy of section 21, division 4, Compiled Statutes, defining murder in the first and second degrees, and requiring the jury to designate by their verdict the degree thereof, is proper, when followed by a full charge upon the crime of manslaughter, and that the jury could not convict of a higher crime unless every characteristic of such higher crime was proved beyond a reasonable doubt, and that they must acquit the defendant if they had any reasonable doubt of his guilt.

SAME—*Character.*—Where the evidence as to the bad character of the deceased was very slight, an instruction which assumes that the character of the deceased for violence had been proved was properly refused.

EVIDENCE.—The evidence reviewed and held sufficient to support a conviction of murder in the first degree.

Appeal from the Second Judicial District, Deer Lodge County.

The defendant was tried before DE WOLFE, J.

Statement of facts, prepared by the judge delivering the opinion.

The defendant was duly indicted for the murder of one John L. Carlson, at Anaconda. He was tried and convicted of murder in the first degree, and is now under sentence of death. A motion for a new trial was made and denied. The defendant appeals from the judgment, and from the order denying a new trial. The testimony for the prosecution fully warranted the jury in believing the killing to have been committed under the following

circumstances: On the twenty-fourth day of August, 1888, the defendant, with two men, the Anderson brothers, went into a saloon, known as the "Morse Saloon," at about eight o'clock in the evening. What the defendant claims took place there at that time is better shown by his testimony, which is hereinafter given in full. They left this saloon and went into another kept by one Wiegrun. While standing at the bar in this latter place, the defendant drew his revolver from his pocket, placed it on the bar, and said that "somebody was going to lick him and fight him, and that he did not care if he got killed or any one else." The testimony of the defendant himself shows that he had previously upon that evening placed the revolver in his pocket. The party then returned to the saloon known as the "Morse Saloon," at which the killing took place. The testimony shows that at this time Carlson, the deceased, was asleep at the table, in the stupor of intoxication. The two Anderson brothers immediately went to the bar with some of their friends who had invited them to drink; and the testimony also fully shows, contrary to the statement of the defendant, that the defendant attempted to force a quarrel upon a man named Hakan, who was sitting some distance from the bar, and that Hakan refused to gratify the defendant's desire. At that time the defendant was at some distance from the bar. While this altercation was in progress, the deceased, being aroused by the noise in the saloon, approached the two Anderson brothers, and either struck the glass or the arm of Charles Anderson, so that the beer was spilled upon Anderson's clothes, and the glass fell to the floor. There was some attempt on the part of the witnesses, undoubtedly friendly to the defendant, to show that Carlson struck Anderson, but the testimony firmly establishes this; that the altercation between him and the Andersons, if any, was of so slight a nature that those in their immediate neighborhood were in no way disturbed by it. The testimony further shows, although the defendant says to the contrary, that the defendant, at this time, walked to the bar and attempted to interfere between Anderson and Carlson; that he asked Carlson "why he [Carlson] was making trouble with these boys;" that Carlson replied to defendant that "it was none of his [defendant's] business;" that Carlson pushed, or attempted to push the defendant away; that the defendant then

took a few steps backward, drew his revolver from his pocket, and shot the deceased in the stomach; that after the shooting the defendant stood still, with his pistol in his hand, and pointed at the deceased, until the latter fell; that the defendant then left the saloon, and escaped from the Territory under an assumed name. There was testimony tending to show that the deceased was a powerful man, and that he had the reputation of being violent; but the legal testimony to this effect was very slight, and was contradicted by other testimony. The defendant himself testified that he did not know deceased, and that he had seen him but once before the day of the shooting. The defendant's testimony is as follows: "I did not know Carlson. I had seen him. At the saloon he came after me, and commenced licking me. One night, before the shooting, I met a man on the sidewalk in front of the Smelter Saloon. This man said to me, 'You had better look out, Johnson, somebody is going to kill you, or put a head on you.' That is the remark he made. I paid no attention to it at the time. This night I went to the saloon and sat at a table. Carlson, the two Anderson boys, and some others came, and commenced talking about me. Hullenburg [the keeper of the saloon] said to the others to keep a watch, they might get a rap or two. I went out with the Anderson boys. Bensington came after me. They asked me if I was afraid, and where I was going. I told them I was going to my boarding-house to lie down. We went by Jack Morse's saloon. I said to go in there, but they wanted to go to Wiegrun's. I thought about the words in the saloon, that they were going to lick me, and so I asked Morse to give me his revolver. Then we went to Wiegrun's saloon. We came back to the Morse Saloon, and went in to see what the noise was about. Hakan was quarreling, and I went up to him and told him he should not fight. While I was talking to him I was struck on the head by some one; I could not see who it was. I turned around and saw Carlson coming to me. He struck me on the mouth with his fist. Then I drew my revolver when he came up the third time. I only meant to keep him away, not to shoot him; but somebody grabbed my arm, and jerked it, and the revolver went off. I started out. I never spoke to Carlson. I once saw him kick a man in the face."

Robinson & Stapleton, for Appellant.

The only question raised is that the evidence was not sufficient to warrant a conviction of murder in the first degree, and the court should have granted a new trial.

Murder in the first degree must spring from malicious intention, deliberate and premeditated. The evidence in this case does not support a verdict of murder in the first degree. It shows the absence of the deliberation and premeditation necessary to constitute the crime. (*McCann v. People*, 6 Parker, Cr. C. 629; *People v. Johnson*, 1 Parker, Cr. C. 291; *People v. Foren*, 25 Cal. 362; *People v. Doyell*, 48 Cal. 86.)

If the act of killing is done immediately under the impulse of passion without time to form a deliberate intent, then the crime is only murder in the second degree or manslaughter. (*Anthony v. State*, Meigs, 265; 33 Am. Dec. 143; *People v. Long*, 39 Cal. 695; *People v. Sanchez*, 24 Cal. 17; *People v. Nichol*, 34 Cal. 214; *Leighton v. People*, 88 N. Y. 117; Statute of Montana, p. 505, § 21.)

The intent to kill may exist without making the crime murder in the first degree. (*People v. Bealoba*, 17 Cal. 395.)

The court erred in the trial in instructing the jury as to the crime of manslaughter. While the court defines the crime and instructs the jury properly that the defendant must show facts reducing the crime from murder to manslaughter, he fails to state clearly and explicitly the facts to which the jury may look for this purpose in considering their verdict. (2 Am. Crim. Law, § 978; *State v. Hill*, 4 Dev. & B. 491; 34 Am. Dec. 396; *State v. Ferguson*, 2 Hill (S. C.) 619; 27 Am. Dec. 412.)

T. F. Frawley, of counsel, for Appellant.

The verdict is against the evidence; the offense committed is not murder in the first degree. (*Darry v. People*, 10 N. Y. 120; *People v. Johnson*, 1 Parker, Cr. C. 291; *People v. McCann*, 6 Parker, Cr. C. 629; Wharton's Criminal Law, § 922; *Hurd v. People*, 25 Mich. 405; *McDaniel v. Commonw.* 77 Va. 281; *Drum v. Commonw.* 58 Pa. St. 16; *Craft v. State*, 3 Kan. 450; *People v. Potter*, 5 Mich. 1; *Maher v. People*, 10 Mich. 212; *Short v. State*, 7 Yerg. 510; *People v. Enoch*, 13 Wend. 159; *Bowers v.*

State, 5 Mo. 364; 32 Am. Dec. 325; *People v. White*, 24 Wend. 558, 581.) The statute of homicide in Kansas is almost identical with that of Montana, and in *Craft v. State of Kansas*, *supra*, the Supreme Court of that State considered the subject very fully and learnedly, and if this court should follow that court in its view of the law, or come to the conclusion there arrived at, then the judgment herein will be reversed. The opinion in that case has, I believe, never been criticised in any subsequent case, and wherever referred to in the books I find it stated as a learned and correct exposition of this statute.

The court erred in instructing the jury that if they found the defendant guilty they must indicate by their verdict if it be murder in the first or second degree, and for this the judgment must be reversed. (*Territory v. Manton*, 7 Mont. 162; *Craft v. State*, 3 Kan. 450; *Horne v. State*, 1 Kan. 42; *Ely v. Tesch*, 17 Wis. 202; *Randall v. Northwestern Tel. Co.* 54 Wis. 140; *Town of Scott v. Town of Clayton*, 54 Wis. 499; *State v. Sumner*, 5 Black, 519.)

The court erred in refusing to instruct the jury that in determining if the defendant acted upon a sudden burst of passion, and without malice or deliberation, they might take into consideration all the circumstances existing at and about the time of the shooting: whether the deceased was making an attack upon the defendant; the nature of such an attack, if any; the relative size and strength of the parties, and the character of the deceased for violence; and for this error the judgment should be reversed. (*Oliver v. State*, 17 Ala. 587; *Commonw. v. Seibert*, Pennsylvania case cited approvingly in Wharton on Homicide [1st ed.], 227, and Wharton on Homicide [2d ed.], 507, and in *Logue v. Commonw.* 38 Pa. St. 265; *State v. Green*, 4 Ired. 404; *Cotton v. State*, 31 Miss. 504; *Rippy v. State*, 2 Head, 217; *Monroe v. State*, 5 Ga. 85; *People v. Garbutt*, 17 Mich. 16; *Little v. State*, unreported Tennessee case, given in full and approved in 1 Crim. Def. 487; *Jackson v. State*, 1 Crim. Def. 476; *Keener v. State*, 18 Ga. 194; *Queensberry v. State*, 3 Stew. & P. 308; *Tackett v. State*, 1 Hawks, 210; *Pritchett v. State*, 22 Ala. 39; *Franklin v. State*, 29 Ala. 14; *State v. Collins*, 32 Iowa, 36; *State v. Keene*, 50 Mo. 357; *Payne v. Commonw.* 1 Met. [Ky.] 370; *State v. Smith*, 12 Rich. 430; 1 Crim. Def. 695;

Copeland v. State, 7 Humph. 429; *State v. Thompson*, 9 Iowa, 188; *Grainger v. State*, 5 Yerg. 479; *State v. Benham*, 23 Iowa, 154; *Commonw. v. Riley*, Thatch. C. C. 471; *Floyd v. State*, 36 Ga. 91; *Pennsylvania v. Robertson*, Addis. 246.)

The court erred in not instructing the jury that as the offense was not committed by any of the specified means enumerated in the statute, that *prima facie* the crime was no greater than murder in the second degree. (*State v. Benham*, 23 Iowa, 154; *Drum v. Commonw.* 58 Pa. St. 16; *McDaniel v. Commonw.* 77 Va. 281; *Craft v. State*, 3 Kan. 450; *People v. Potter*, 5 Mich. 1.)

John B. Clayberg, Attorney-General for the Territory, Respondent.

To constitute murder in the first degree, there must not only be an intent to kill, but it must be deliberate and premeditated, except in special cases provided in the statutes, as where it occurs during the commission of another felony, etc.

To constitute murder in the second degree, no deliberation or premeditation is necessary. Some confusion has arisen in the California cases, from the opinion of the court in *People v. Long*, 39 Cal. 694, where it was said that there must be an intent to kill in murder in the second degree; that there must be malice, but cannot be premeditation or deliberation. This confusion was cleared away by the opinion of the court in the case of *People v. Doyell*, 48 Cal. 85, where the court distinguished between an intent presumed from the character of the weapon used and the real intent of the party, and held that if the evidence proved the very intent to take life, the murder is of the first degree.

It is equally well settled that it is not necessary that any appreciable time should exist between the provocation and the commission of the act, in order to make it murder in the first degree.

Objection is raised by appellant that the court refused to give a request which should have been given. If our position as to the evidence is correct, this court cannot consider this point. It cannot say that the request asked to be given was applicable to

the testimony, unless the testimony is properly on the record for the consideration of this court. (*Territory v. Bell*, 5 Mont. 562.) The substance of this request was given by the court. This is all the law requires. (*People v. Lachanais*, 32 Cal. 433; *People v. Ah Chung*, 54 Cal. 398; *People v. Murray*, 41 Cal. 66; *People v. Varnum*, 53 Cal. 630.)

It is also objected that the charge of the court contained in paragraph No. 7 (Transcript, pp. 69, 70), takes away from the jury the question of manslaughter. The court below charged very fully upon this point. A part of the charge cannot be segregated and relied upon as error, when the charge taken as a whole is correct. (*People v. Turcott*, 65 Cal. 126; *Williams v. State*, 83 Ala. 16; *Flemeister v. State*, 81 Ga. 768.)

BACH, J.—The counsel for appellant, in their argument in open court, have abandoned the position taken in their brief, that the evidence in this case shows no graver crime than manslaughter; and they now urge that the evidence does not justify the verdict of murder in the first degree. That the killing was unlawful is admitted; that it was malicious is admitted; but it is claimed that the evidence does not show wilfulness, deliberation, and premeditation, which are necessary to constitute murder in the first degree. The current of authorities undoubtedly establishes that there is a difference between a killing which is murder in the second degree, even when express malice is shown, and such a killing as is wilful, deliberate, and premeditated, as well as malicious. In order that the unlawful and malicious killing shall be murder in the first degree, it must be wilful; that is to say, it must be intentional; and it must also be deliberate and premeditated; that is to say, when the killing is the result of an assault, the assault must have been made with the preconceived and determined design, intent, and purpose to kill, and the mind must be free from irresistible passion aroused or excited by great provocation. And it is also well settled that the deliberation and premeditation need not be of any considerable length of time previous to the assault. It is enough if the intent to take life was the result of deliberate premeditation, even though the act follow immediately upon the decision; provided always that the mind is free from sudden heat or passion. But how do all

these refinements aid us in determining this question of deliberate and premeditated intent? Is murder in the first degree, other than that committed by torture, or poison, or perpetrated in the commission of a felony, to be confined to those cases where the accused declares his intent? Such a rule would be absurd. It would be open to two objections. The cases where the intent to kill is declared by the most depraved creature are not more rare than are those cases in which a declaration "I will kill you" is a declaration of any real intent to kill. The man who has fully determined to take away the life of a fellow-creature seldom declares his intention. The thoughtless declaration made by one during an excitement, or, as is more often the case, made carelessly, "that he will kill," forms no sure test. The nature of the weapon may give some clew; but the *res gestæ* of each case, the acts of the accused party before and at the time of the killing, form the surer test; and if a recitation thereof compels the mind of the listener to the conclusion that the assault was made with the wilful, deliberate, and premeditated intent to kill, then he may conclude that the killing was murder in the first degree. To such a conclusion the jury was forced in this case. To such a conclusion are the members of this court forced. The defendant arms himself with a revolver. He declares that trouble is awaiting him; that he is indifferent to it; and that his life or the life of some one else will pay the forfeit. Thereupon, bent upon mischief, or at least inclined thereto, he enters a saloon, and, as he says, interests himself in Hakan's quarrel, which is of no interest to him, but, as others say, finds Hakan, and tries to force a quarrel upon him, and fails. Near by another altercation is in progress, so slight that those standing there pay no attention to it, but keep passing to and fro, as usual. Into this altercation the defendant forces himself, is told to mind his business, and is pushed by the deceased, who is so recently aroused from the stupor of intoxication that he staggers backward as a result of his own act. The defendant then walks a few steps away, takes from his pocket the pistol which he placed there with the remark that "some one might get killed," directs the pistol at the stomach of the deceased, and shoots him. That is not all; he stands there with the pistol in his hand, and pointed at the deceased, until the latter falls. Then he departs.

We are forced to the conclusion that the defendant was seeking the occasion to which he referred in Wiegrun's saloon when he displayed his pistol; that he tried in vain to force a quarrel upon Hakan; that finding a quarrel elsewhere he forced himself into that, and there found the occasion to satisfy the remark he made when he placed the pistol in his pocket; that he shot in the furtherance of that remark; and that when he stood, pistol in hand, he waited to see if he had accomplished his purpose. The cases cited by the appellant do not present facts similar to those in this case. In some of them there was no weapon of a deadly nature used; in some there was great provocation; and in some there was a question of self-defense. Of the cases cited, counsel seem to place most reliance upon those found in Parker's Criminal Cases. In the latest reports in the court of appeals of the same State will be found an authority, cited below, which, we think, is more closely analogous to the case under review.

In the case of the *People v. Majone*, 91 N. Y. 211, the testimony for the prosecution was to the effect that the defendant was living with his wife and with her parents; that he had not lived peacefully with them; that upon the day of the killing he entered the room in which his wife, his mother-in-law, and a friend were sitting, and asked his wife to procure for him a paper from an adjoining bedroom; that she replied that she was busy; that he thereupon seized her by the arm and led her to the bedroom, saying, "Will you go, or will I go?" and immediately shot her. He came back at once, and shot and killed his mother-in-law. It was further shown that the defendant had had the pistol for some time. The defendant was indicted for the last killing, and was convicted of murder in the first degree, and the conviction was sustained by the court of appeals.

In *People v. Hunt*, 59 Cal. 430, the facts upon which the jury convicted the defendant of murder in the first degree were as follows: The defendant entered a certain bar-room with one T., and began to shove T. backwards and forwards against the bar. G. (the deceased) stepped up to the defendant, and told him not to strike T. any more. Defendant turned partly around, and said: "What have you to do with this?" G. answered

that he was a peace officer. The defendant then struck G., who turned and moved away; whereupon defendant drew his revolver and shot and killed G. The Supreme Court affirmed the order denying a new trial. It must be remembered that the killing was done without any provocation sufficient to reduce the crime to manslaughter; in fact, that counsel for defendant admit that the evidence would sustain a verdict of murder in the second degree.

Whether a murder is in the first or in the second degree is for the jury to decide from the facts under careful instruction upon the law by the court. (*People v. Beckwith*, 103 N. Y. 360-369; *People v. Goslaw*, 73 Cal. 323, 324; *Territory v. Stears*, 2 Mont. 324.) By this is not meant that the jury may declare every unlawful and malicious killing to be murder in the first degree, without any evidence of fact to justify them; but what is meant is this, that where there is evidence tending to show that an unlawful and malicious killing was committed wilfully, deliberately, and premeditatedly, the verdict of the jury will not be disturbed by this court. In this case the conduct of the defendant before the killing, his declaration before referred to, his arming himself with a deadly weapon at that time, his forcing himself into quarrels, the use of the deadly weapon, the shooting the deceased in such a part of the body as would tend to make the wound fatal, the absence of provocation, the defendant waiting until his victim had fallen, his rapid flight, and change of name, are evidence from which the jury, under instruction upon the law of the case, might well conclude that there was wilfulness, deliberation, and premeditation. (See the authorities cited. See, also, Wharton on Homicide, § 181, and cases there cited.)

It is urged that the court below erred in giving instruction No. 7, which is the *verbatim* copy of section 21 of subdivision 4, Compiled Statutes, defining murder in the first and second degrees. The concluding words of the instruction, as well as of the statute, are as follows: "And the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first or second degree." The purpose of this instruction is apparent. The court told the jury that it was the duty of the jury, and not of the court, to fix, by their verdict,

the degree of murder, provided the jury found the defendant guilty of murder. The case does not fall within the rule cited by counsel, that, where a special instruction is given erroneously, the error will not be cured by a general instruction stating the correct rule. The crime of manslaughter was not withdrawn from the jury; for immediately following this instruction the jury were fully charged upon the crime of manslaughter; and the jury were further told, in effect, that if they found the defendant guilty of an unlawful killing they could not find him guilty of any higher crime than manslaughter, unless the evidence proved to their satisfaction, beyond a reasonable doubt, each and every of the characteristics of such higher crime; and they were further told that they must acquit the defendant if they had any reasonable doubt as to his guilt.

The defendant relies upon *The Territory v. Manton*, 7 Mont. 162. In that case the jury were inadvertently told to convict the defendant of manslaughter if they had any reasonable doubt of his being guilty of murder in either of the degrees, the verdict "not guilty" being taken from them. It is apparent that the case is not in point.

It is urged that the court below erred in refusing to give the following instruction, as to character, requested by defendant: "In determining whether or not the defendant acted upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, as defined to you by the court, and without malice or deliberation, you must take into consideration all the circumstances existing at and about the time of the shooting; whether or not the deceased was making an attack upon the defendant; the nature of the attack, if any; the relative size and strength of the parties; and the character of the deceased for violence."

We might assign several reasons for sustaining the action of the court below in refusing this request. There was no evidence of any provocation which was apparently sufficient to arouse an irresistible passion, and this the counsel admit, when they abandon their claim that the gravest crime shown was manslaughter; therefore it might be claimed that the court properly refused the instruction for that reason, even though the request may have been proper if confined to the question of

deliberation alone. Again it might be urged that the instruction was elsewhere given; but we prefer to base our conclusion that the request to instruct was properly refused, upon the following ground, viz.: The request assumes that the character of the deceased for violence had been proved; at most, the defendant was entitled only to an instruction calling the attention of the jury to the evidence upon this point. In this case the assumption of the bad character of the deceased was particularly faulty, because there was very slight legal evidence tending to such a conclusion, as most of the witnesses gave their opinions, and not the reputation of the defendant.

The judgment and order appealed from are affirmed, and it is hereby ordered that the judgment of the court below be carried into execution upon the ninth day of August, A. D. 1889, in accordance with the terms thereof, as modified by the reprieve granted by the governor of Montana.

BLAKE, C. J., and LIDDELL, J., concur.

TERRITORY OF MONTANA, RESPONDENT, v. BRYSON, APPELLANT.

CRIMINAL LAW—Competency of juror.—Where the examination of a juror for cause establishes the facts, that he knew nothing of the case, except having read newspaper accounts at the time; that he had formed and may have expressed an opinion; that he had no bias or prejudice in the case; that he could discard that opinion; that he could decide the case fairly and impartially upon the law and the evidence adduced upon the trial, he is competent under the provisions of subdivision 11, section 287, division 3, Compiled Statutes of Montana.

CONSTITUTIONAL LAW—Compiled Statutes of Montana, section 287, subdivision 11, declared constitutional.—Compiled Statutes of Montana, division 3, section 287, subdivision 11, providing that a juror, who has formed or expressed an opinion as to the guilt or innocence of the accused, is competent, if it appear that such opinion is founded upon reading newspaper statements, and the juror feels able, notwithstanding such opinion, to render an impartial verdict, is not repugnant to the Constitution of the United States, conferring the right of trial by an impartial jury.

CRIMINAL PRACTICE—Examination of juror.—An objection to the ruling of the trial judge, excluding a question asked upon the examination of a juror for cause, cannot be heard in this court for the first time.

SAME—Motion for a new trial.—Under section 1 of the Act of September 14, 1887, relating to motions for new trial, a statement on motion for a new trial may be settled and passed upon by the successor of the judge who tried the case.

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SAME—Contents of statement.—It is not error for the court to refuse to incorporate into the statement of the case a portion of the argument of the prosecuting attorney, advancing a theory, in order to show that some newly-discovered evidence would overthrow such theory.

EVIDENCE—Grounds of objection.—An objection to the admission of certain letters in evidence, on the trial, is insufficient if no grounds of objection are stated.

NEWLY-DISCOVERED EVIDENCE.—Newly-discovered evidence reviewed, and held immaterial and insufficient for the purpose of a new trial. The evidence reviewed and held sufficient to sustain a conviction of murder in the first degree.

Appeal from First Judicial District, Lewis and Clarke County.

The defendant was tried before McCONNELL, C. J. A motion for a new trial was refused by BLAKE, C. J.

S. A. Balliet, for Appellant.

The court erred in refusing to permit counsel for the defendant to inquire of the juror, Hopps, and other jurors, as to the extent of the opinion he and they had formed, and the amount of evidence it would require to override such an opinion. (*Stephens v. People*, 38 Mich. 741.)

The judge was equally in the wrong in overruling the challenge on the showing as it stood; he should further have found whether or not the juror was indifferent. The Constitution of the United State provides that in criminal prosecutions the accused shall have a right to a speedy and public trial by an impartial jury. (Art. 6, § 28.) Of course, no legislation can take this away. (38 Mich. 741, 742, *supra*.) In a criminal case, when, after a full examination, the evidence given, upon a challenge, leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt. (*Holt v. People*, 13 Mich. 227; *Moses v. State*, 10 Humph. 458; *Henry v. State*, 4 Humph. 270.) In the case at bar the jurors answered that they had an opinion; their answer was not that they had an impression of the light character referred to in *Holt v. People*. It is unnecessary to elaborate upon the distinction between a mere impression and a frame of mind ripened into an opinion. The same authority holds that the burden is upon the defendant to show that the opinion of the juror was of that fixed and definite character, which would leave such a bias upon his mind as to preclude his giving due weight to the presumption of innocence with which the law surrounds the accused.

The burden resting on the defendant, the court erred in refusing to permit defendant's counsel to further inquire into the fixed and deliberate character of the juror's opinion. The competency of the juror should not be questionable. It should appear that he stands indifferent, and above all legal exceptions. (*Moses v. State*, 10 Humph. 460.) It is manifest that it was the intention of the trial judge to form the jury under section 287, division 3, Compiled Statutes; but is insisted on behalf of the defense that the act is in violation of article 6, Amendments to the Constitution of the United States, which secures to the accused in all criminal prosecutions a "speedy, public trial by an impartial jury." (*Carson v. State*, 6 Baxt. 466; *Rice v. State*, 1 Yerg. 432; *McGowan v. State*, 9 Yerg. 192; *Payne v. State*, 3 Humph. 375; *Brakefield v. State*, 1 Sneed, 215; *Norfleet v. State*, 4 Sneed, 340; *Kling v. Fries*, 33 Mich. 277; *Territory v. Kennedy*, 3 Mont. 520.) This leads us to inquire what the word "impartial" means, as it is defined when used in constitutional enactments. A man who is impartial is one who is not biased in favor of one party more than another; who is indifferent, unprejudiced, disinterested as an impartial judge or arbitrator; free from any bias, or indifference, or disinterestedness. (Cooley's Constitutional Limitations, 60; *Carson v. State*, 6 Baxt. 469.)

The following authorities hold that the fact that a jurymen had disclosed his opinion on either side was a principal cause of challenge, on the grounds that he was not impartial: 6 Baxt. 470; 1 Tidd, 853; Coke on Littleton, 156; 3 Burr. 1856; 5 Bac. 353. In all criminal prosecutions, the constitution guarantees to the accused a trial by an impartial jury; that is, a jury who will give him the benefit of all his rights, including that of the presumption of his entire innocence of crime until proven guilty. (*Olive v. State*, 11 Neb. 23; *Curry v. State*, 4 Neb. 545; *Carroll v. State*, 5 Neb. 31; *Conway v. Clinton*, 1 Utah, 219; *Slout v. Hyatt*, 13 Kan. 232; *Atchison etc. R. R. Co. v. Franklin*, 23 Kan. 74.) The court said, while passing upon the competency of the juror, Hopps, that if it was not for the statute he would consider him an incompetent juror. If he was incompetent without this statute, it necessarily follows that he was incompetent because he was not an impartial juror; and, if he was not an impartial juror, he was constitutionally disqualified;

and, if he was constitutionally disqualified, no amount of State legislation can make him a competent juror. It is more reasonable to suppose that the statute on this subject was intended to be in affirmance of the common-law rule, than that it was meant to take from the accused the most important security of a fair trial. (*Stephens v. People*, 38 Mich. 743.)

The evidence is insufficient to sustain the verdict. (*Ohms v. State*, 49 Wis. 415.) The defendant has a right to have a hearing on a motion for a new trial before the judge who presided at the time of the trial. (*Ohms v. State*, 49 Wis. 415; *United States v. Harding*, 1 Wall. Jr. 137; *Warrain v. Smith*, 2 Bulst. 136.)

John B. Clayberg, Attorney-General, for the Territory, Respondent.

Brief of William Wallace, Jr., of special counsel for the Territory. Counsel for the defendant is not in a position to avail himself of the alleged error of the court in refusing to permit him to put the question (to the juror, Hopps) "whether it would require evidence to override his opinion," for the reason that he took no exception to the action of the court upon this point. The rule that an objection cannot be taken for the first time in this court, or upon motion for a new trial, is well settled. (*Drake v. Foster*, 52 Cal. 225; *Frink v. Alsip*, 49 Cal. 103; *Keeran v. Griffith*, 34 Cal. 581; *Tebbs v. Weatherwax*, 23 Cal. 59.) Defendant assigns no reason of any character in support of his exception. The authorities are uniform that the record must show distinctly the grounds and causes for the challenge. (Thompson and Merriam on Juries, § 253; *Ripley v. Coolidge*, Minor, 11; *Rash v. State*, 61 Ala. 89; *State v. Bullock*, 63 N. C. 570; *People v. Bodine*, 1 Denio, 281; *Fillion v. State*, 5 Neb. 351.) The judge in a criminal trial must, of necessity, have a large measure of discretion in passing upon the qualifications of jurors, and his ruling will not be set aside unless there is manifest error. (*State v. Walsh*, 34 La. An. 991; Thompson and Merriam on Juries, § 252.) Even in those States where no statute exists upon the subject, the rule is recognized that before fixed convictions will disqualify they must amount to settled convictions. (*People v. Bodine*, *supra*; *People v. King*, 27 Cal. 512; *People v. Reynolds*, 16 Cal. 130; *People v. McCauley*, 1 Cal. 379.)

The defendant cannot, for the first time in this court, be heard to urge the unconstitutionality of section 287, division 3, Compiled Statutes. The statute is not open to any such objection, and its constitutionality is upheld and settled beyond cavil by the following line of authorities: *Cooper v. State*, 16 Ohio St. 328; *Stokes v. People*, 53 N. Y. 164; *Thomas v. People*, 67 N. Y. 218; *Balbo v. People*, 80 N. Y. 484; *Thomas v. State*, 36 Tex. 315; Thompson and Merriam on Juries, §§ 222, 223, 224.

The contention of appellant, that he had a right to have his hearing on the motion for a new trial before the judge who presided at the time of the trial, is likewise without merit, for the reason that it was by defendant's consent, and through his own action, that the matter came on for hearing before Judge BLAKE, the successor of the judge who tried the case. Under our statute, Judge BLAKE was the proper person to hear and determine this motion. Under a statute similar to our own, California has repeatedly held that the defendant has no right to have the motion passed on by the same judge who tried the case. (*People v. Hobson*, 17 Cal. 424, 430; *People v. Henderson*, 28 Cal. 466, 475; *People v. Hodgson*, 55 Cal. 72, 75.)

LIDDELL, J.—The defendant was indicted, tried, and convicted of murder in the first degree, and sentenced to be hung. From an order overruling a motion for a new trial, as well as from the judgment, he prosecutes the present appeal.

No objections appear in the record to the judgment, which we may say, after a careful examination, is completely responsive to the indictment, and we dismiss the subject with this statement.

We now address ourselves to the errors complained of in the motion for a new trial, and for convenience will consider them in the order in which they appear in the motion, reserving, however, for the last, the question as to whether or not the verdict is contrary to the law and the evidence.

During the progress of the trial, a juror by the name of Hopps, being interrogated on his *voir dire*, testified as follows: "I have heard something about this cause by reading an account of it in the newspapers, and presume I expressed an opinion at the time. I have no feeling of bias or prejudice in this case, and can give the defendant a fair and impartial trial upon the

evidence adduced here upon the witness stand." *Question by counsel for defendant.* "You say you have an opinion at the present time in regard to the guilt or innocence of the accused?" *Answer.* "Yes, sir." *Question.* "Is that opinion formed from reading newspapers?" *Answer.* "Yes, sir." *Question.* "And you state you can discard that and try this case according to the evidence?" *Answer.* "I could." *Question.* "Would it require any amount of evidence to override the opinion that you have already formed?" At this point the trial judge interrupted the examination, and overruled the question of his own motion, stating that it necessarily would require some evidence to remove the opinion; and thereupon counsel for defendant discontinued the examination of the juror; nor does the record disclose any further examination by either the court or prosecuting attorney. No objection was made to this ruling of the court; but the same question being afterwards propounded to three other jurors, the court made the same ruling, and after giving reasons at some length for the ruling, said that counsel might have the benefit of the exception. But from a careful inspection of the record, it nowhere appears that there was any objection to the action of the court, or an exception actually reserved; while it does appear that immediately upon the ruling the counsel for defendant challenged the juror for cause, and when that was overruled, he reserved an exception in due form. Under the circumstances we do not consider that there was any objection made to the ruling of the court in excluding the question, and, as a consequence, it cannot be heard here for the first time. (See Gear's California Digest, p. 58, and the authorities there cited, under the title of "Errors not excepted to.") But, even if it were otherwise, the action of the court was not prejudicial to the rights of the accused, for, in making his ruling, the judge expressly said that it would be presumed that some evidence was necessary to a change of opinion in the mind of the juror; but inasmuch as the statute had provided that a juror who had so formed his opinion was competent if, notwithstanding what he had read, he could decide the case fairly and impartially upon the law and the evidence, it was a needless question, and we agree with him; for no matter from what source the juror formed his opinion, unless it be from conversation with wit-

nesses, or reading reports of the testimony, it must be fixed and unqualified in order to disqualify him, which was evidently not the case with the juror in hand. (*People v. King*, 27 Cal. 512; *People v. Borline*, 1 Denio, 308; *People v. Reynolds*, 16 Cal. 130; *People v. McCauley*, 1 Cal. 379.)

We next come to the examination of the challenge of the juror for cause; that is, his disqualification on account of his having formed and expressed an opinion based upon newspaper accounts of the circumstances. In considering the disqualification of a juror under such circumstances, we necessarily touched somewhat upon the matter in considering the last point; but it was only incidentally before us. Paragraph 11, section 287, of the Criminal Practice Act provides, that having formed or expressed an opinion shall disqualify the juror, unless it appears that the juror has formed his opinion from reading newspaper statements, comments, or reports, and can state on oath that he feels able, notwithstanding such opinion, to decide the case fairly and impartially upon the law and the evidence. The examination of the juror established the following facts: (1) That he knew nothing of the case, except having read newspaper accounts at the time; (2) that he had formed, and may have expressed, an opinion; (3) that he had no bias or prejudice in the case; (4) that he could discard that opinion; (5) that he could decide the case fairly and impartially upon the law and the evidence adduced upon the trial.

This was the condition of the juror when the counsel for defendant by his challenge for cause presented the question for the ruling of the court; and it left the record showing affirmatively the qualifications of the juror, thus bringing the point directly in line with the case of *People v. Cochran*, reported on page 548, 61 California Reports.

Counsel for defendant did not seek to inquire whether the juror had formed his opinion from reading newspaper reports of the testimony of witnesses, which would have disqualified him; nor did he request the court to make any such examination; nor did he complain of such omission, or reserve any exceptions, except to the overruling the challenge for cause. We do not understand that by paragraph 11, section 287, of the Criminal Practice Act it is made the duty of the judge to examine

the juror, unless he is requested so to do, or in his discretion thinks proper to make such investigation. He is not charged either with the prosecution or defense of criminals, and when counsel for prosecution and defense have made such examination as is desired, they may then invoke a ruling by the court. It is their province to elicit from the juror on his *voir dire* such facts as they may deem necessary for the court to hear in passing upon the challenge for cause. The counsel for defendant might have inquired himself of the juror whether he had formed his opinion from reading reports of the testimony of witnesses, and not having done so, or requested the court so to do, he cannot be heard to urge that objection for the first time in this court. Manifestly, had he so requested, the objection could have been obviated in the lower court.

The record shows affirmatively that there was no error in the ruling of the trial judge, for the juror stated that his opinion was formed from reading newspaper accounts, thus negating the idea that he had read reports of the testimony of witnesses. In fact, we are satisfied that this was the view taken of the matter by counsel, as well as the trial judge.

In a very exhaustive brief, counsel for defendant urges upon our consideration the unconstitutionality of paragraph 11, in section 287 of the Criminal Practice Act, inasmuch as the statute provides, under certain conditions, that a juror is qualified, notwithstanding the fact that he has already formed and expressed an opinion as to the guilt or innocence of the defendant; and that, having formed such an opinion, he is not impartial; and the law is therefore in conflict with the sixth amendment to the Constitution of the United States, which confers the right of trial by an impartial jury.

The question is not new, but has been frequently passed upon in the various States until now it is no longer open. Even in those States where no statute exists upon the subject, the rule as to the qualification of the juror under such conditions is the same. So far as this court is concerned, the matter must be considered as definitely settled by the decisions of the Supreme Court of the United States in the case of *Spies v. Illinois*, reported in 123 U.S. 131. The Illinois statute provided "that, in the trial of any criminal cause, the fact that a person called

as a juror has formed an opinion or impression, based upon rumor or newspaper statements, about the truth of which he has expressed no opinion, shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes that he can fairly and impartially render a verdict therein, in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement." By comparing this statute with the paragraph in the Montana law, it will be found that no material difference exists between the two. The trial judge, in passing on the Illinois statute, said: "It is not a test question whether the juror will have the opinion which he has formed from newspapers changed by the evidence, but whether his verdict will be based upon the account which may here be given by the witnesses under oath." And this the juror, in the present instance, testified he could do. We refer to that case, and to the numerous authorities there cited from the various States where a statute similar to that under consideration has been either accepted as constitutional or decided to be such, and we dismiss the subject with the following extract from that opinion: "Without pursuing the subject further, it is sufficient to say that we agree entirely with the Supreme Court of Illinois in its opinion in this case, that the statute on its face as construed by the trial court is not repugnant to section 9, article 2, of the Constitution of that State, which guarantees to the accused party in every criminal prosecution 'a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed.' As this is substantially the provision of the Constitution of the United States on which the petitioners now rely, it follows even if their position as to the operation and effect of that Constitution is correct, the statute is not open to the objection which is made against it." The trial judge was in error when he regarded it as imperative to accept the juror after he had stated that, notwithstanding the opinion he had formed, he could try the case fairly and impartially, and render a verdict according to the law and evidence, for the statute still left it to the discretion of the court to be satisfied that the juror was impartial, and that he could render such a verdict. This, however, was a harmless error, and did not operate prejudicially to the defendant, for the examination on the *voir dire* showed

the juror to be impartial, and to have no bias. He was qualified under the law, and the court committed no error in overruling the challenge for cause.

The objection that there is no proof of the venue is equally untenable, and cannot be seriously contended for under the circumstances. Incontestable evidence establishes the fact that the deceased was last seen in company with the defendant in the city of Helena, on the 21st of August, 1888, and that her body, with marks of violence upon it, was discovered some time in the month following hid away at the bottom of an old prospect hole near the city aforesaid, in the county of Lewis and Clarke.

The next error complained of is rather illogical, and equally without merit. It is contended by the counsel for the accused that the statement on motion for a new trial should have been settled and passed upon by the judge who tried the case, instead of his successor, the present chief justice. This objection is not apparent upon the record by any objection to the authority of Judge BLAKE to hear the motion; and when we consider that the defendant is the moving party, and that through counsel he has caused a statement on motion for a new trial to be prepared, settled, and decided by the judge of the district in which the case came up, it is rather singular that he should want the court to reject the statement on the motion for a new trial for a fault, if any, which is attributable to the appellant. If counsel for defendant were correct in this position, we could consider nothing contained in the statement on motion for a new trial, and the appeal would then stand upon the question of whether the indictment charged an offense under the laws of the Territory, and, if so, whether the verdict is responsive to the indictment. But we are satisfied that the statement on the motion is properly before us; for although the case was tried before Judge McCONNELL, nevertheless, when he retired from the bench, Judge BLAKE, who was his successor in that district, had the authority to act in the matter. Section 294 of the Civil Practice Act, permits bills of exception on motion to be signed by the judge who heard the cause, although his term of office has expired; but section 349 of the Criminal Practice Act merely provides that exceptions "must be settled and signed by the judge, and filed with the clerk of the court." We derive our sections of both

civil and criminal procedure upon this subject from California, and the Supreme Court of that State has on three occasions interpreted the law adversely to the pretensions of the appellant. (See *People v. Hobson*, 17 Cal. 424; *People v. Henderson*, 28 Cal. 466; *People v. Hodgson*, 55 Cal. 72.) An uncertainty of the practice, however, in this respect, has been finally set at rest by the Act of September 14, 1887, relating to motions for new trials in this Territory. By section 1 of the act referred to it is provided that motions for new trials may be heard and determined by the judge of the District Court wherein the same is pending, either at chambers or in open court.

We have carefully considered the evidence, upon which it is claimed that a new trial should be granted, but fail to discover anything material in it, or which would be likely to produce a different result were the motion allowed. The newly-discovered evidence throws no light upon the guilt or innocence of the accused. Briefly stated, the affidavits of the four witnesses show the following facts: Frank Martin's affidavit is to the effect that he and his wife were at the prospect hole the day before the discovery of the body, and that the foot-print of a woman, as testified to by one of the witnesses for the prosecution, may have been that of his wife; while the most that can be said of the testimony of Wright and Bailey is that, two days after the arrest of the defendant, they were at the prospect hole in which the body of the deceased was found, and on that occasion saw a dark, heavy-set man, who wore a mustache, coming away from the hole, and that he seemed to avoid them, walking rapidly in the direction of town. On another day they were at the prospect hole, and there met a man, woman, and child, and that in fine weather, at that time of the year, persons may be seen any day strolling in the hills where this prospect hole is situated. Mrs. McCConnell's testimony is even of less importance than the foregoing, for she never saw the deceased, but from her published picture and descriptions she believes that on the Sunday previous to the disappearance of deceased she saw her walking in the direction of the hills where the prospect hole is situated, and at the time she was accompanied by a dark, heavy-set man, who wore a mustache. When we consider that the deceased was last seen on the Wednesday evening following, this testimony becomes

utterly irrelevant; and, indeed, a score of persons might have testified to the same effect without throwing any light on the question of the guilt or innocence of the accused, who, if he committed the murder, did so after the time at which the deceased was seen out walking. In so far as the evidence shows that the deceased had as an admirer a dark-complexioned, heavy-set man, who wore a mustache, and sometimes accompanied her in her walks, it is merely cumulative, and is therefore insufficient for the purpose of procuring a new trial. This brings us to the consideration of a bill reserved to the refusal of the judge to incorporate in the statement a part of the argument of the prosecuting attorney while addressing the jury. In this argument he advanced a theory, based upon the evidence, as to the manner in which the crime had been committed; and it was against this theory that most of the newly-discovered evidence was leveled. We know of no law for such a practice, nor does it follow that the deductions from the facts by the prosecutor were either correct or that they were the inferences upon which the jury based their verdict.

The complaint concerning the admission in evidence of certain letters cannot be sustained, for the reason that, in making his objection, counsel for defendant failed to state any grounds or reasons therefor. Such an objection has been held to be insufficient. (*Tucker v. Jones*, 8 Mont. 225; *Herman v. Jeffries*, 4 Mont. 522.) It is true that the evidence in the case is altogether circumstantial; in other words, it is a collection of independent facts from which the jury is asked to infer or presume the guilt of the accused. This kind of evidence is never so satisfactory as that of positive or direct testimony, for the danger lies in making an erroneous deduction from the facts proved. The instructions of the court as to the nature and character of circumstantial evidence, the method of considering it, together with its weight and sufficiency, were doubtless satisfactory to the accused, since we find no objection thereto in the record. And, under the circumstances, we think that the verdict of the jury so guided in their deliberations is in all respects entitled to as much weight and consideration as if based upon direct and positive evidence. From the evidence we find that the deceased was the mistress of the accused; that she was some years older than he was; that while living together in St. Paul in this illicit way

they had quarreled, and she had caused him to be arrested and confined in jail. For this he was very much incensed with the deceased, and, although a reconciliation was effected and he came to Helena with her, his letters previous to that time and his conduct while here indicated that he still bore malice to the dead woman and was anxious to be rid of the *liaison*. They lived together as man and wife while in Helena, she prepaying the rent for a month on the room occupied by them at the time of the disappearance. On the day she was last seen a lady lodging at the same place changed a ten-dollar piece for the deceased, who requested her to keep five dollars until her return, and she afterwards left the house for a walk, in company with the accused. She was dressed in a light, summer costume, and had left her clothes and personal effects unpacked and hanging or scattered about the room.

Nothing was ever seen of the deceased after this, which was on Wednesday afternoon of the 22d of August, 1888; until about the last of September following, when her body was discovered concealed under a pile of rocks at the bottom of an old prospect hole in the vicinity of Helena. When discovered it was evident that the deceased had met her death by violence, and that she had been killed and hidden for over a month in the prospect hole. Upon the body was the same costume worn the evening of the departure from the boarding-house with her pretended husband, and around her neck was a chain which the dead woman usually wore with her watch. The fastening by which the watch and chain were connected had been wrenched or violently jerked away, and the watch itself was missing. Unmistakable marks of violence upon her person showed that she had been murdered. The accused returned to the lodging-house without his wife on the same evening of his departure, and a light was observed in his room as late as ten o'clock that night. On the next morning the accused was awake and moving about the room at least three or four hours earlier than ever before. He packed his wife's clothing and effects in two trunks, disposed of one or two articles by gift, and, in reply to a question, stated that he was going to Butte, and that his wife had already preceded him. He left the boarding-house that morning, but instead of going to Butte, took lodging at another place in Helena, and

registered under the name of Lundstrom. That day and the next he spent in pawning some of the wearing apparel of his wife and her watch. He then shipped the two trunks to Butte by express, refusing, however, to prepay the charges, but saying that they would be called for by Annie Lundstrom, who was "one of the girls." After this, he again changed his boarding-house, and registered under the name of Bud Burnes, from Seattle. He was identified as the person who had pawned the watch, which was also proven to have belonged to the deceased, and having been worn by her on the evening when she was last seen in company with the accused. The loop or ring in the handle of the watch, by which it was attached to the chain, had been drawn out of shape in an elongated form, as if the result of a violent jerk or pull. In the mean time, public sentiment being aroused over the disappearance of the woman, the accused was arrested and carried before the magistrate. He declined to give any explanation in regard to the trunks, but stated that the deceased had gone to Butte and that he had seen her there. In his testimony, on the trial of the case, he admitted that this statement was untrue, and that he had not been to Butte, but that he believed that the deceased had gone there, and he was so informed by one Spencer, who does not appear to have been sworn as a witness in behalf of the accused. It further appears that, prior to his arrest, he had taken the precaution to procure his mail from the postoffice through one Mrs. Thompson, whom he at one time introduced as his wife, Mrs. Burnes. These facts, with many other minute circumstances too numerous to mention, bind the chain of guilt so strongly about the defendant that his own testimony becomes utterly futile and unworthy of belief. He wholly fails to explain or account for his possession of the dead woman's watch on the day after her disappearance; and unless we close our eyes to all evidence in this case, except the testimony of the defendant in his own behalf, the conclusion is overpowering that he is the individual who perpetrated the murder. The facts are inconsistent with his innocence, nor are they susceptible of any explanation other than that based upon the hypothesis of his guilt.

In conclusion, we are satisfied that the defendant has had a fair and impartial trial, and should suffer the penalty of the law

for the great crime he has committed. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed and carried into execution, according to the terms thereof.

BACH, J., and DE WOLFE, J., concur.

TERRITORY OF MONTANA, RESPONDENT, v. GUYOTT,
APPELLANT.

CONSTITUTIONAL LAW—Sale of liquor to Indians—Police power of territorial government.—Section 160, division 4, Compiled Statutes, prohibiting the sale of liquors to Indians, is an act within the police power of the territorial government, and is not inconsistent with the clause of the Constitution granting to Congress the power to regulate commerce with the Indian tribes, nor with the laws of the United States framed thereunder.

SAME—Construction of statutes.—A sale of whiskey in Montana outside of an Indian reservation to an Indian, belonging to a tribe living upon a reservation in charge of an Indian agent, is not commerce "with the Indian tribes" within the meaning of the Constitution of the United States, article 1, section 8, subdivision 8.

CONSTITUTIONAL LIMITATION—Legislative power of Territory.—Under the legislative power of Territories extended by section 1851, Revised Statutes of the United States, there is no limitation upon the authority of a Territory to pass laws for the regulation and restriction of "the sale of articles deemed injurious to the health or morals of the community."

Appeal from Second Judicial District, Silver Bow County.

The defendant was tried before DE WOLFE, J., who sustained the constitutionality of the statute under which the defendant was indicted.

McBride & Haldorn, for Appellant.

The law under which the defendant was indicted, tried, and sentenced is unconstitutional and therefore void. The territorial government of Montana is one of limited powers, having only such powers as are expressly given to it by Congress; it has none of the essential attributes of sovereignty, and is but a province over which Congress exercises supreme control. (*Territory v. Lee*, 2 Mont. 124; *New Orleans v. Winter*, 1 Wheat. 91; *Perris v. Higley*, 20 Wall. 378.) The only authority which Congress has given to Montana is to be found in the "Organic

Act." "The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." (§ 1851, Rev. Stats. U. S.) The Constitution of the United States has vested in Congress the exclusive right to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Const. U. S. subliv. 3, § 8, art. 1.) Trade with the Indians, in all its forms, is subject exclusively to the regulation of Congress. (Duer Const. Jur. 281; Rawle on the Const. ch. 9, p. 84; 2 Story on Const. §§ 1097-1101, inclusive; *Worcester v. State of Georgia*, 6 Peters, 515; *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761.)

Intoxicating liquor is a legitimate article of commerce. (*Bowman v. Chicago etc. Ry. Co.* 125 U. S. 465-501.) The sale of an article of commerce by an individual white man to an individual Indian, even when such Indian is off his reservation, is commerce with the Indian tribes within the intent and meaning of the Constitution of the United States, and Congress has the exclusive right to regulate such commerce. (*United States v. Bridleman*, 7 Fed. Rep. 894, 897, 898, 900; *United States v. Holliday*, 3 Wall. 407, 415, 416, 417, 418; *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188; *United States v. Earl*, 17 Fed. Rep. 75; *Brown v. Houston*, 114 U. S. 622.)

So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammelled, and any regulation of the subject by the States is repugnant to such freedom. This has been laid down as law in the judgments of this court. (*Robbins v. Shelby Taxing Dist.* 120 U. S. 489, 493, 497; *Walling v. Michigan*, 116 U. S. 459; *Territory v. Lee*, 2 Mont. 136, 137.)

If the territorial legislature can regulate or prohibit commerce with the Indian as to intoxicating liquor, it can also regulate commerce with him as to any other article of commerce, and can prescribe rules and inflict punishment for their violation upon the licensed agent of the United States. Much less should the territorial legislature have assumed to legislate upon this subject of commerce with the Indians, Congress having already enacted a law in reference to this very subject, and prescribed the punishment for commerce in this article with the Indian in

violation of the said act, which punishment is much less than that attempted to be prescribed by the territorial legislature. (Rev. Stats. U. S. § 2139.)

John B. Clayberg, Attorney-General for the Territory, Respondent.

BLAKE, C. J.—The appellant has been convicted of the crime of selling whiskey in Butte at the county of Silver Bow and outside of any Indian reservation in this Territory “to a certain Indian,” contrary to the form of the following statute: “If any person shall, directly or indirectly, sell, barter, or give intoxicating liquor, whether fermented, vinous, or spirituous, or any decoction or composition of which fermented, vinous, or spirituous liquor is a part, to any Indian or half-breed Indian in this Territory, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished. . . .” (Comp. Stats. div. 4. § 160.) The sole question before us involves the constitutionality of this act. The counsel for the appellant and the attorney-general concur in the view that the legislative assembly has no power to control this subject. The same issue was raised in the court below, where the validity of the statute was upheld. This assent of counsel would be decisive in ordinary actions, but we cannot permit any law to be adjudged null and void, or a provision of the Constitution to be interpreted, without an investigation. The Constitution provides that “the Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” (Art. 1, § 8, subdiv. 3.) In pursuance thereof a statute was passed in 1832, which has been amended from time to time, and is now comprised in the following section: “No ardent spirits shall be introduced under any pretense into the Indian country. Every person (except an Indian in the Indian country) who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces, or attempts to introduce, any spirituous liquor or wine into the Indian country, shall be punishable. . . .” (Rev. Stats. U. S. § 2139.)

It is contended that the sale mentioned in the indictment was

commerce "with the Indian tribes," within the meaning of the words of the Constitution, and that the power of Congress is exclusive over the subject. The following cases are cited in support of the position which has been stated: *United States v. Holliday*, 3 Wall. 407; *United States v. Cisma*, 1 McLean, 254; *United States v. Burdick*, 1 Dak. 142; *United States v. Shaw-Mux*, 2 Sawy. 364; *Brown v. Houston*, 114 U. S. 622; *Robbins v. Shelby Co.* 120 U. S. 489; *Bowman v. Chicago R. R. Co.* 125 U. S. 465; *United States v. Earl*, 9 Sawy. 79.

The authorities establish certain principles, which are concisely announced in *Robbins v. Shelby Co. supra*, by Mr. Justice Bradley: "The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. . . . Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. . . . The only way in which commerce between the States can be legitimately effected by State laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property; . . . the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community." We concede that these principles are applicable to laws which regulate commerce "with the Indian tribes," and we must declare this statute of the Territory unconstitutional if it is legislation of this nature, and not subject to any conditions. While the indictment alleges that the whiskey was sold to "a certain Indian," the testimony proves that he belonged to the tribe living upon the Flathead Reservation, and in charge of Mr. Ronan as agent. These facts bring the case within the purview of the foregoing statutes of the Territory and United States. The cases of *United States v. Holliday, supra*; *United States v. Cisma, supra*; *United States v.*

Burdick, supra; *United States v. Shaw-Mux, supra*; and *United States v. Earl, supra*, sustain the jurisdiction of the courts of the United States in trying and punishing persons who violate the laws of Congress prohibiting the sales of intoxicating liquors to Indians, and maintain the power of Congress to enact statutes governing the subject under the clause of the Constitution regulating commerce with the Indian tribes. These doctrines are not questioned by this court, and do not decide that a State or Territory has no right to pass laws making definite acts of its citizens in selling intoxicating liquors to Indians crimes, and prescribing penalties for their infraction.

It will be instructive to consider the exceptions in *Robbins v. Shelby Co. supra*, which are embraced within the police power of the States, and particularly the restrictions upon the traffic in intoxicating liquors. In *Ex parte Smith*, 38 Cal. 707, Mr. Justice Sanderson says: "Legislatures have enacted a variety of laws, which undoubtedly, in a general sense, affect the rights of life, liberty, property, safety, and happiness, by way of restraint. Of such are laws regulating the slaughter of animals, the interment of the dead, the erection of buildings in cities and towns of inflammable materials, the manufacture and keeping of gunpowder and other explosive compounds, the vending of poisons and other noxious drugs, the sale of intoxicating beverages to certain classes of persons, as Indians, and even to all classes of persons, as in the case of the prohibitory liquor laws of Maine and Massachusetts. . . . The constitutionality of some of this legislation has been debated and doubted; but I believe the general opinion now is that none of it is opposed, but, on the contrary, that all of it is not only consistent with, but essential to, the most perfect enjoyment, in a constitutional sense, of the natural rights of persons." In *License Cases*, 5 How. 577, Mr. Chief Justice Taney says: "But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government.

And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper." In *Foster v. Kansas*, 112 U. S. 206, Mr. Chief Justice Waite says: "In *Bartemeyer v. Iowa*, 18 Wall. 129, it was decided that a State law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the Constitution of the United States. This was re-affirmed in *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, and that question is now no longer open in this court." In *Hannibal etc. Railroad Co. v. Husen*, 95 U. S. 470, Mr. Justice Strong, in the opinion, observes: "We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety." Mr. Cooley, after commenting upon the authorities concerning the laws affecting the manufacture and sale of intoxicating drinks as a beverage, concludes: "They are looked upon as police regulations, established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances." (Const. Lim. [4th ed.] 727.) Mr. Justice Holmes, in a note to Kent's Commentaries, refers to the police power of the government and says: "The most remarkable cases as to the exercise of this power are those arising out of the liquor laws. Such laws do not interfere with the power of Congress to regulate commerce, if they prohibit the sale of imported liquor only when it has passed out of the hands of the importer, or when the original packages have been broken up by him." (Vol. 2 [12th ed.], 340, n. 2.) In *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 650, Mr. Justice Harlan says: "That there is a power sometimes called the 'police power,' which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is con-

ceded in all the cases." (See, also, Black, Const. Prohib. § 65; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1.)

We are aware of the broad distinction between the government of a State and Territory, but "the legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." (Rev. Stats. U. S. § 1851.) In *Hornbuckle v. Toombs*, 18 Wall. 655, it is adjudged that, "as a general thing, subject to the general scheme of local government chalked out by the Organic Act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any State legislature." There is no limitation upon the authority of a Territory to pass laws for the regulation and restriction of "the sale of articles deemed injurious to the health or morals of the community." The act under consideration is clearly within the police power of the territorial government, as defined by the courts, and is not inconsistent with the Constitution and laws of the United States. The judgment is affirmed, and the original judgment is hereby directed to be carried into execution as entered in the court below.

BACH, J., and LIDDELL, J., concur.

FITSCHEN ET AL., RESPONDENTS, v. THOMAS ET AL.,
APPELLANTS.

TRIAL PRACTICE — Burden of proof. — Where defendants' answer admits the contribution by plaintiffs of the aggregate sum as alleged in the complaint, but avers the expenditure of a greater sum, the excess being paid by defendants, which is denied in the replication, plaintiffs were not bound to introduce any evidence upon this point until defendants had produced theirs.

SAME — Testimony. — The testimony of a witness will not be stricken out because he testifies to the best of his recollection; and the weight to be given it is a matter for the jury.

INSTRUCTION — Harmless error. — Where an instruction, standing alone, is erroneous, but when in connection with other instructions the law is correctly stated, the error is harmless.

SAME. — It is not error for the court to refuse an instruction requested by defendants which is based upon a different theory from that contained in their answer.

EVIDENCE — Verdict. — Whenever there is any evidence to support the verdict or findings of the court, and there is no manifest error, neither will be interfered with.

SPECIFIC PERFORMANCE — Reformation of contract. — Defendants had agreed with plaintiffs to relocate a disputed mining claim, for the purpose of defeating a suit by the prior claimant affecting the titles of plaintiffs to certain lots, the expenses incident thereto to be shared proportionately, and upon a successful termination of the suit each lot owner to receive a conveyance of his share of the disputed and relocated claims. Money was collected and expended to the knowledge of the defendants, they receiving a part of it, and asserting that they did so for the lot owners. The attorney for the defendants prepared the contract, and it was read over to one of the defendants and signed by him after one of the lot owners assented to its correctness, and afterwards signed by the rest of the defendants. In an action for specific performance the defendants pleaded a mistake discovered two years prior, but which they had never before claimed, and which they did not attempt to account for on the trial. *Held*, that the contract would not be reformed on the ground of mistake.

Appeal from Second Judicial District, Silver Bow County.

The action was tried before DE WOLFE, J.

Robinson & Stapleton, for Appellants.

Knowles & Forbes, for Respondents.

LIDDELL, J. — This is a suit to enforce the specific performance of a contract, by requiring the defendants to make titles to the plaintiffs of certain undivided portions of the surface ground embraced within the boundaries of the patented mine, situated in the city of Butte, and known as the "Destroying Angel."

Briefly stated, the facts which preceded this litigation are as follows: In 1882, the plaintiffs and defendants, and one William H. Archer, were the owners of certain lots of ground in the city of Butte, upon which some of them had erected buildings, and were engaged in business. These lots were situated either in whole or in part upon ground embraced within the limits of what was then known as the "Diadem Lode Claim," and which was then claimed by Lea Mantle and others, who had instituted an action in ejectment against all of the present plaintiffs and defendants.

The defendants in that suit, now the parties to this action, with the exception of Archer, having a common interest in defeating the suit of Mantle and others, held a meeting to devise some plan and means for defending the suit.

The result of the meeting was a determination to fight the Mantle suit; and a flaw having been discovered in the location of the Diadem lode, it was determined, upon the advice of counsel, by Thomas, Rains, and Archer to relocate the same ground as a mining claim, which should be known under the significant name of the "Destroying Angel." This new claim embraced within its limits the ground claimed by the Diadem, and, although of the same length, it extended to a considerable distance on either side of it. Well knowing that the success of the Destroying Angel would defeat the proprietary rights of Mantle and others, the defendants in the ejectment suit resolved to cast their fortunes with the claim bearing this ominous name.

To that end the other lot owners entered into an agreement with their co-defendants, Archer, Thomas, and Rains, whereby it was agreed that each lot owner should pay his proportion of the expenses attending the locating of the Destroying Angel, of obtaining patent therefor, of fighting the suit of Mantle and others, and of fighting the adverse claim of the Diadem lode; and, upon the successful termination of the litigation, they agreed to convey to each lot owner the lot or lots which he then claimed upon the Diadem or Destroying Angel, and any surface ground which might be left over upon the Destroying Angel should be distributed among those who contributed to the litigation, in the proportion which each contribution bore to the whole amount expended in said litigation. On the 19th of January, 1884, Archer, Thomas, and Rains executed their written contract to carry out this verbal agreement, which was left in the possession of J. F. Beck, one of the interested parties, and chairman of the committee appointed at the meeting heretofore referred to. The plaintiffs each responded with their contributions, which were consumed in paying counsel fees, locating, representing, and surveying the mine, and in defraying the expenses of the litigation going on between the Destroying Angel and the Diadem Lode Claim.

When the contest terminated in favor of the former, and the suit of Lea Mantle and others were dismissed as to the present plaintiffs, they demanded titles to their respective lots and interests in the surface ground of the Destroying Angel, and

upon the refusal of the defendants to comply with their agreement, they instituted the present suit.

Defendants admit their signature to the written agreement, but aver that there was a mistake in the act, which does not express the true contract or intention of the parties. They insist that it was never their intention to part with, nor of the plaintiffs to acquire, title to anything but their lots which were situated on the Diadem lode, and such parts of lots as were located on the Diadem and the Destroying Angel; and that the agreement to distribute, *pro rata*, the remaining surface ground upon the Destroying Angel, as set forth in the contract, was erroneous, and never in fact entered into by and between the parties. Two other grounds of defense are relied upon, and which will be noticed further on.

Special findings were made by the jury and adopted by the court as the basis of the decree, and from an order overruling a motion for a new trial, as well as from the judgment, the defendants have appealed the case to this court.

Proceeding now to consider the errors complained of in the rulings of the lower court, we will examine them in the order in which they appear in appellants' brief, reserving, however, for the last the question of the sufficiency of the evidence to support the findings and decree.

It is claimed that the court erred in denying the motion for a nonsuit, for the reason that the evidence of the plaintiffs failed to show that they had paid the respective amounts due by them as their contributions towards the maintenance of the litigation with the Diadem lode. The complaint alleges that the particular sums contributed by each plaintiff or his grantor for the purpose of defraying the expenses of the litigation amounted in the aggregate to \$1,445.53, and this is admitted in the answer; but defendants contend that there was expended at least \$1,900, and that the difference between the two sums had been paid by them in excess of the respective contributions. Inasmuch as this excess of expenditure was denied in the replication, the plaintiffs were not bound to introduce any evidence upon the subject until the defendants had produced their evidence upon the point. This statement is sufficient to refute the charge of error in this matter.

The next objection is to the refusal of the court to strike out the testimony of the witness Singer, for the reason that he was unable to state positively whether the defendant Thomas was present at a meeting of the defendants in the Mantle suit, had for the purpose of devising ways and means to carry on the litigation with Mantle and others and the Diadem lode with the Destroying Angel. We find that this witness testified to the best of his recollection and belief that Thomas and Rains were both present at the meeting; in fact, he was tolerably sure of it, but on account of the lapse of time he would not be positive. While it is more desirable that a witness should be positive in his testimony, it is sufficient if he testifies to the best of his knowledge, recollection, and belief; and the weight to be given it is entirely a matter for the jury. The motion to strike out was more to the effect of the testimony than to its admissibility.

The third error complained of was in giving a certain instruction asked for by plaintiff. Counsel for defendant contends that it misstates the law, and is ambiguous; but when taken in connection with the other instructions, there is no error to the prejudice of the defendants. As a general rule, parol evidence is inadmissible to contradict or vary the terms of a written instrument, but, as fraud and error vitiate all contracts, it is a principle of universal jurisprudence that parol testimony may be used to establish such facts. The point under consideration was whether or not there had been a mistake in the preparation of the written contract, and that was ascertained from all the surrounding circumstances. While the trial judge instructed the jury in one part of his charge "that parol evidence was not introduced for the purpose of enabling them to decide what was the original agreement, but merely to enable them to say if there was any mistake in drawing the agreement, and if so to reform it," yet in another instruction he modifies this by directing them to find for the defendants, if, upon examining the evidence, they become satisfied that the written agreement does not express the true contract between the parties. Now under the law this was certainly as favorable to the defendants as they had any right to expect, and stated their claims more broadly than it should have done. But in inquiring into the question of whether there had been any mistake in the agreement, it would be necessary first

to find out whether both parties understood the contract as claimed by defendants; and to prove this fact, as well as the error in the preparation of the written act, parol evidence was certainly admissible. Had the objectionable expression stood alone, and without the modification in that and another instruction, we would have sustained the objection, and granted a new trial. But as the instructions read on the whole, the jury were directed to decide from the testimony what was the real agreement between the parties; and if the written contract did not fairly express it, then to reform and correct the instrument. Under the circumstances the error complained of is harmless.

Defendants now complain of the refusal of the trial judge to instruct the jury "that if the plaintiffs, at the time of entering into the contract, thought they were contracting in regard to all the surface ground included within the boundaries of the Destroying Angel, while the defendants and Archer thought and understood that they were contracting only in regard to that part of the Destroying Angel Lode Claim which was within that part known as the 'Diadem,' then there was a mutual mistake as to the subject-matter of the contract, and consequently no contract." Considering the allegations in the answer that the mistake was mutual, and that both parties intended and did contract only in relation to the surface ground comprised within the limits of the Diadem, this instruction was properly refused. After alleging the mutual mistake of all parties, and that the real agreement was the one set out in defendants' answer, it was outside of the issues to ask for an instruction based upon the theory that each understood a different agreement. There was a *prima facie* case against the defendants, and the plaintiffs were standing upon the defendants' acknowledged, unambiguous, written agreement. Now, under the issues, the defendants could not show that there was no agreement entered into; for they were limited to proving that all parties had understood and agreed upon a contract different from that contained in the written agreement, to wit, the contract as set forth in their answer. If this had been a suit by the defendants to avoid the contract on the ground of mistake as to the subject-matter thereof, then the instructions asked would have been proper.

Speaking of the equitable relief to be granted in cases of mistake, Story, in his work on Equity Jurisprudence (9th ed.), section 147, says: "There must always be shown either the mistake of both parties, or the mistake of one with the fraudulent concealment of the other, to justify a court of equity in reforming a contract." This view of the law is admirably expressed by Chief Justice Spencer in the case of *Lyman v. United Ins. Co.* 17 Johns. 376, where he uses the following language: "It is not enough, in cases of this kind, to show the sense and intention of one of the parties to the contract; it must be shown incontrovertibly that the sense and intention of the other party concurred in it—in other words, it must be proved that they both understood the contract as it is alleged it ought to have been, and as in fact it was, but for the mistake. It would be the height of injustice to alter a contract on the ground of mistake, where the mistake arises from misconception by one of the parties in consequence of his imperfect explanation of his intentions. To make a contract it is necessary that the minds of the contracting parties agree on the act to be done. If one party agrees to a contract under particular modifications, and the other party agrees to it under different modifications, it is evident there is no contract between them. If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it further be shown that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract." (See, also, Hilliard on Vendors, p. 12, § 45; and p. 309, § 9.)

In adopting the findings of the jury as to the amount of money expended in securing title to the Destroying Angel, and in defending the suit of Mantle and others, we are unable to agree with counsel that the court committed an error. The evidence of the defendants upon this point is unsatisfactory, when it should have been clear and explicit. They do not state with precision how it became necessary to incur this additional expense, nor the various items which go to make up the sum. Besides, it is certainly established that defendants have received considerable sums in addition to the amounts contributed by the plaintiff, which would cover any reasonable expenditures by the

former. In passing upon this point, we may as well say that the objection to the finding of the court that "the defendants expended their *pro rata* of the amount of the pool" in and about securing title to the Destroying Angel is sufficiently supported by the evidence, and will not be disturbed. Whenever there is any evidence to support the verdict or findings of the court, and there is no manifest error, neither will be interfered with.

We now come to consider the case upon its merits, and are convinced that it is altogether with the plaintiffs. The record contains abundant evidence to show that the Destroying Angel was located for the express purpose of defeating the suit of the Diadem claimants; that this location was made under the advice of the attorney, and for the benefit of defendants in that litigation; that the lot owners (the present defendants and plaintiffs) had a meeting to devise means and ways for defending that suit; that at that meeting an assessment was agreed on, and a chairman and committee were appointed to collect the necessary funds. The money was collected and paid out to the amount of \$1,445.53, as alleged, and was consumed in defraying the expenses of the suit with Mantle & Co., in locating, surveying, and doing the work necessary to represent the Destroying Angel, and costs of proceedings in the land office, and in the contest which arose in the courts between the two conflicting mining claims. We are also satisfied that the defendants knew of the expenditure of the money; that they received a portion of it in their own hands; and that each of them often asserted that they were acting for the lot owners, and did not desire to make any money off of their co-defendants. It is also incontestable that the attorneys for the defendants prepared the written agreement now sued on at the instance of the defendant Rains; that it was read over to him before signing; and, upon his inquiring of Beck, the chairman of the lot owners' committee, as to its correctness, and receiving his assent, it was then signed by Rains, and afterwards by the other defendants, and the document was then deposited in Beck's hands as the proper custodian. The error, if any, was discovered by Thomas about two years before the trial of this suit, yet he made no effort to reform the contract, and never claimed there was any error or mistake in the agreement until

the institution of this action. The Mantle suit was commenced in 1882, while the present case was begun in March, 1887.

It must be borne in mind that the plaintiffs sue upon an unambiguous, written contract to convey title to this ground, and that the defendants admit the execution of the instrument, but contend that there is a mistake in it, in this, that it does not represent the true contract between the parties, which they set out in their answer. This is a special defense, which imposes the burden of proof upon them, and which they must also make out by a preponderance of evidence. It is true that the defendants assert their view of the contract, but the plaintiffs emphatically deny any such understanding, and by satisfactory proof establish the fact that the written instrument expresses the true intention of the parties. It is not noticeable in this connection that neither of the defendants, nor their attorney who prepared the written act, gave any testimony as to the preparation of the instrument; nor is there any attempt to explain the manner by which the alleged mistake crept into the writing. When a party has in his possession evidence which would illustrate his case, and he fails to produce it, the presumption will be against him.

“If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy.” (Story on Equity Jurisprudence, § 152, and authorities there cited.) The same eminent author further declares, in the preceding section, that when both parties to the contract are equally innocent, and there has been no surprise or concealment, the mistake, whether mutual or intentional, affords no ground for equitable interference.

Without expressing any opinion as to whether defendants have been guilty of laches or unreasonable delay in asking to reform the contract, there are sufficient grounds already considered to induce us to affirm the order and decree of the lower court, which is accordingly done, at cost of appellants.

BLAKE, C. J., and BACH, J., concur.

FANT, APPELLANT, v. LYMAN, RESPONDENT.

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d24	326

UNENCLOSED LANDS—Malicious trespass. — There can be no recovery for damages sustained to the owner of unenclosed lands by reason of sheep straying or being driven thereupon and destroying the grass and verdure, unless it appear that they were maliciously driven upon such lands for the purpose of causing injury.

DAMNUM ABSQUE INJURIA. — Where domestic animals are driven upon unenclosed lands for the purpose of pasture, and for no malicious purpose, the injury thereby sustained to the owner of the lands is *damnum absque injuria*.

INSTRUCTIONS. — In an action for damages for malicious injury to unenclosed lands, where the verdict was for the defendant, the giving or withholding of an instruction as to exemplary damages become immaterial, as the jury must have found that the injuries charged were not malicious.

Appeal from First Judicial District, Lewis and Clarke County.

The action was tried before BLAKE, C. J.

Turner & Burleigh, for Appellant.

Wade, Toole & Wallace, for Respondent.

DE WOLFE, J. — This was an action brought by the appellant (plaintiff) against the respondent for trespass for wilfully and maliciously driving sheep on the land of appellant, and thereby causing them to consume and destroy the grass and verdure growing thereon. The answer denies any wilful or malicious trespass, and alleges that, if the sheep of defendant went on the land of plaintiff, they went in pursuit of food, and from their own instinct, and because there was no fence or other obstruction to prevent them from straying on said land.

The cause was tried by a jury, which rendered a verdict for defendant, and on this verdict judgment was rendered against plaintiff for costs. A motion for a new trial was made and overruled, and from this order and the judgment the plaintiff appeals, and assigns as error the instructions given by the court, and the modification of instruction numbered 4 asked by defendant. The court, in substance, instructed the jury that if the sheep of the defendant strayed on the unenclosed lands of the plaintiff, or if they were driven there for the purpose of pasturage, and not for the purpose of maliciously injuring said lands, the plaintiff could not recover in this action; that under the laws of this Territory the defendant had the right to pasture domestic

animals on unenclosed lands, and if plaintiff wished to prevent this, he could do so by enclosing his lands with a lawful fence.

The foregoing appears to us a correct statement of the law applicable to the facts as alleged in the pleadings. Section 1119 of the fifth division of the Compiled Statutes subjects the owners of animals to liabilities for any damage done by them by breaking into the lands of another enclosed by a lawful fence. This section negatives the liability of the owner when animals lawfully at large, as in this instance, stray on unenclosed lands in quest of food or pasturage. This is clearly within the rule *damnum absque injuria*, if injury arises to the owner of the land.

The instruction asked by defendant, and refused by the court, related to exemplary damages, in case the jury found that defendant committed the acts complained of wilfully and maliciously. The principle is, no doubt, correct that juries may award exemplary, in addition to actual, damages, when the injuries complained of are committed maliciously; and, in a case where the malicious nature of the injuries is clearly proven, it is no doubt the duty of the court, if asked, to give an instruction authorizing the award of exemplary damages. The jury in the present case were not so instructed, but the evidence is not contained in the record, and without a statement of the evidence it is impossible for this court to say whether or not such an instruction was relevant. The question whether the injuries charged against the defendant were malicious or not appears to have been submitted to the jury under proper instructions, as we have already stated, and, inasmuch as they found a verdict for the defendant, they must have found that the injuries charged were not malicious. The giving or withholding an instruction as to exemplary damages could not, therefore, have changed their verdict. The judgment of the District Court must be and is affirmed.

BACH, J., and LIDDELL, J., concur.

SCHERRER, RESPONDENT, v. HALE, APPELLANT.

PRACTICE—Statement on motion for a new trial.—A statement on motion for a new trial which is not signed by the judge, with his certificate to the effect that the same is allowed, will be stricken from the record on motion in this court, and no implied authentication by waiver will be recognized.

SAME—Error of law.—An order of the court striking out a portion of the answer, made before trial, is not an error of law occurring during the trial, and cannot be considered on a motion for a new trial, but may be reviewed only upon an appeal from the judgment taken within the time allowed by law.

Appeal from First Judicial District, Lewis and Clarke County.

The action was tried before WADE, C. J. A motion for a new trial was refused by BLAKE, C. J. Motion by plaintiff to dismiss the appeal.

Wade, Toole & Wallace, for Appellant.

Sanders, Cullen & Sanders, for Respondent.

BACH, J.—The respondent has made two motions upon this appeal: *First*, to strike out so much of the record as purports to be a statement on motion for a new trial; *second*, to dismiss the appeal from the judgment because no error in the judgment roll can be considered, for the reason that the appeal from the judgment was not taken within the time fixed by law.

The motion to strike from the record so much thereof as purports to be a statement on motion for new trial is based upon the fact that there is no certificate of the judge attached to said paper declaring the same to have been allowed by him. Section 298 of our Code, regulating the practice in this particular, provides that "when settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed."

In *Raymond v. Therton*, 7 Mont. 299, it was held that the Supreme Court would not consider a statement on motion for new trial unless the proper certificate was annexed thereto; and in that case, Mr. Justice Galbraith carefully noted the difference between the authentication of a statement on motion for a new trial and the authentication of a statement on appeal, as provided for and regulated by the Code.

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9	63
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The statement on appeal may be agreed to by the parties or their attorneys, and certified to by them as correct, or it may be certified to by the judge; but in all cases, the statement on motion for new trial must be certified to by the judge.

The respondent urges that no objection was made to the record in the court below, and claims an implied authentication by waiver. The California cases sustaining such a doctrine were made under statutes not in force in this Territory. Mr. Hayne, in his work on New Trial, has reviewed the history of the various decisions of that State upon this question, and it will there be found that the Supreme Court of California has never implied the authentication of the statement on appeal, or of the statement on motion for new trial, since the enactment of those laws which are now in force in our jurisdiction, having been adopted by our legislature. (See Hayne on New Trial and Appeal, § 157.) Section 298 of our Code was first enacted in this Territory in 1877, and is taken from the California Code as amended in 1874. (See Harston's Practice, § 659.)

In *Raymond v. Thexton*, 7 Mont. 299, the record shows the same waiver, if any, as appears in this case. The record failed to show any objection taken in the court below; but this court, on motion, refused to consider the statement because there was no certificate. In *Schreiber v. Whitney*, 60 Cal. 431, the claim of implied authentication is directly met; for there was attached to the record in the court below the certificate of the parties that the same was complete; and there was also attached thereto their stipulation that the motion for new trial might be heard upon the same; but the Supreme Court of that State refused to consider the statement. (See, also, *Adams v. Dohrmann*, 63 Cal. 419.)

It is urged, however, that the pleadings are properly before us, and that we can consider the order of the court below in striking out a portion of the answer. This alleged error is contained in the specification of errors attached to the statement on motion for new trial, and is referred to as "an error of law occurring at the trial." It is sufficient to say that this was not an "error of law occurring during the trial," and therefore was not such an error of law as could be considered on a motion for new trial. There may be an exception to this rule in those cases

where a motion to change a pleading is acted upon during the trial; but the order in this case was made before trial, and can be reviewed only upon an appeal from the judgment itself. It will be seen from an inspection of the authorities that the phrase, "error of law occurring during the trial," refers to such errors as are strictly errors of law, and not errors involving discretion, and that is confined strictly to errors occurring during the trial of the cause. (See Hayne on New Trial and Appeal, § 100, and cases cited.)

It is also urged by the respondent that the instructions are before us, and that we may consider any error contained therein. The instructions are no part of the judgment roll (see § 306, Code Civ. Proc.), therefore they are not made part of the record by that means. Again, in his notice of intention to move for a new trial, the appellant declares that the motion will be made upon a statement, and refers to no other record, so that we need not consider the effect of the statute enacted at the special session of the legislature in 1887, regarding exceptions to instructions; for the instructions in this case were made a part of the statement in the court below, and are a part of the record only, because they are contained therein; and it would seem that, inasmuch as the appellant failed to state in his notice of intention that his motion would in part or in whole be based upon bills of exceptions, he cannot be heard upon an implied bill of exceptions. However that may be, there is another objection to considering either the instructions or the order affecting the answer. The statement must be stricken from the record, because it does not contain the certificate of the judge. When the statement falls, the specification of errors also falls; and when there is no specification of errors, a motion for a new trial, based upon errors of law, cannot be granted. (See subd. 3, § 298, Code Civ. Proc.)

The order denying the new trial, therefore, cannot be considered in this court.

The appeal from the judgment must be dismissed, because the appeal was not taken within the time allowed by law. The judgment and order of the court below are affirmed, with costs.

LIDDELL, J., and DE WOLFE, J., concur.

STEUFFEN, RESPONDENT, v. JEFFERIS, APPELLANT.

PRACTICE ON APPEAL — Motion for new trial. — An order denying a motion for a new trial will not be considered on appeal when the statement has not been certified to by the trial judge as having been allowed.

SAME — Notice of appeal. — An order denying a motion for a new trial is an appealable order, and will not be considered on appeal where the notice fails to designate such order as the subject of review.

BRIEFS — Error in judgment roll. — When no brief is filed by appellant calling attention to any error in the judgment roll, the court will presume that there is none.

Appeal from First Judicial District, Lewis and Clarke County.

The judgment was rendered by BLAKE, C. J.

R. G. Davies, for Appellant.

George F. Shelton, and A. C. Botkin, for Respondent.

BACH, J. — Judgment was rendered in the court below in favor of the plaintiff and against the defendant, and defendant made a motion for a new trial, which motion was denied.

The order denying the motion for a new trial cannot be considered in this court, against the objection of respondent: *First*, because the so-called statement was never certified to by the judge as having been allowed by him. (See *Scherrer v. Hale*, ante, page 63, decided at this term of court, and cases cited.) *Second*, because the defendant has not properly appealed from the order denying a new trial.

The notice of appeal is as follows: "You, and each of you, are hereby notified that the defendant and the intervenor in the above-entitled action hereby appeal to the Supreme Court . . . from the judgment, . . . and all other orders of said court," etc.

The order denying a motion for a new trial is one from which an appeal may be taken directly; but a litigant, wishing to appeal from such order, must give notice thereof, and his notice of appeal must direct the attention of the adverse party to the fact that such order will be the subject of review in the appellate court. (See *Day v. Oalkow*, 39 Cal. 593; *Sperling v. Calfee*, 7 Mont. 514.) This court will not consider the order denying the new trial.

The statement in the record cannot be considered as a statement on appeal, because it has neither been allowed by the court, nor does it contain any certificate of the parties or their attorneys "that it has been agreed upon by them, and is correct." (See § 435, p. 178, Comp. Stats.; *Scherrer v. Hale*, ante, page 63, decided at this term. See, also, *Raymond v. Thexton*, 7 Mont. 299, and cases cited.) Further: No brief has been filed by the appellant, calling our attention to any error contained in the judgment roll proper, and we must presume that there is none. Judgment and order denying a new trial are affirmed, with costs.

LIDDELL, J., and DE WOLFE, J., concur.

TERRITORY OF MONTANA, RESPONDENT, v. PENDRY,
APPELLANT.

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APPEAL—Record—Verdict.—An objection on appeal that the verdict is contrary to the law and the evidence will not be considered where the record contains none of the evidence and the indictment is technically perfect.

INSTRUCTIONS—Repetition of instructions.—When the court had given the instruction in substance as requested by the defendant, there is no error of which the accused can complain in the refusal of the court to repeat the instruction.

GRAND JURY—Indictment—Statutory construction.—Section 145 of the Criminal Practice Act directs that in the investigation of any charge for the purpose of finding an indictment, the grand jury shall receive none but legal evidence. *Held*, that the statute was directory and not mandatory; that it was the duty of the grand jury to reject illegal evidence whenever aware of it, but that the law did not annul an indictment for such cause, as it was not one of the grounds enumerated in section 206, Criminal Practice Act; and that a question to one of the grand jury upon motion to set aside the indictment, as to whether he knew what was legal evidence, was properly refused.

LARCENY OF CERTAIN ANIMALS—Proof of value.—Under the statute which declares the theft of certain animals, whatever their value, to be grand larceny, it is unnecessary to allege or prove any particular value for the stolen animal, and that it had some value may be inferred by the jury from the facts and circumstances in the case, in the absence of direct testimony.

Appeal from First Judicial District, Beaverhead County.

The defendant was tried before McCONNELL, C. J.

Campbell & Duffy. for Appellant.

The court erred in refusing to give the instructions in the exact language, as requested by defendant, when such instruc-

tions correctly state the law. (*Conrad v. Lindley*, 2 Cal. 174; *Russel v. Amador*, 3 Cal. 400; *People v. Hurley*, 8 Cal. 390; *People v. Ramirez*, 13 Cal. 172; *People v. Williams*, 17 Cal. 142; *People v. Lachanais*, 32 Cal. 434.)

The court erred in charging the jury that "in the crime of stealing a steer or ox it is not necessary to prove that the ox is of any special value. To constitute grand larceny, it is enough if he is of any value whatever, and this you may infer from any facts and circumstances which may be proven, in the absence of any direct evidence on that point." This instruction is clearly erroneous.

The Montana statute does change the rule of the common law. The question of value being a material question of fact, to be proven by the Territory, could only have been proven by direct evidence showing the market value of the property. (*State v. Doepke*, 68 Mo. 208; *State v. James*, 58 N. H. 67; 2 Am. Crim. Rep. 638; 4 Am. Crim. Rep. 348.)

John B. Clayberg, Attorney-General, for the Territory, Respondent.

A careful examination of the instructions refused, and the charge given, shows that the court gave in substance all the requests that were proper. This is sufficient. (*Boyce v. Cal. Stage Co.* 25 Cal. 460; *People v. Lachanais*, 32 Cal. 433.) The case first above cited overrules the earlier cases relied on by the defendant's counsel. The second case above cited declares it to be safer to give all legal instructions as requested, but that it is not error to change the language. (*People v. Ah Chung*, 54 Cal. 398; *People v. Murray*, 41 Cal. 66; *People v. Varnum*, 53 Cal. 630.)

The charge given relative to the value is correct. The crime is a statutory one, and the statute specifically says "of whatever value." The court does not say that the jury need not find any value, but that no special value need be proven by direct evidence. The common-law rule is changed by statute. Under the California statute the element of value does not enter into the definition of the offense. In such cases it is not necessary to state the value in the indictment. (*People v. Townsley*, 39 Cal. 405; *People v. Leehey*, 4 Pac. Coast L. J. 75.)

As the evidence was not contained in the transcript there is no way of ascertaining whether the charge was applicable to the evidence. (*Territory v. Bell*, 5 Mont. 562.)

LIDDELL, J.—The defendant was indicted, tried, and convicted of the crime of stealing a steer, and from an order overruling his motion for a new trial he prosecutes the present appeal.

The six grounds upon which he relies for a reversal will be considered in the order in which they appear in his motion.

His first two objections are that the verdict is contrary to the law and the evidence; both of which may be summarily disposed of by the statement that the record contains none of the evidence used upon the trial, while the indictment is technically perfect, inasmuch as it follows the words of the statute, and the verdict is completely responsive so the indictment.

The third objection is that the court *a quo* erred in refusing to give the instructions asked by the defendant. An inspection of the record shows that the instructions requested by the defense had already, in substance, been given by the court, and we do not think, under the circumstances, that there was any error in the trial judge's refusal to emphasize by repetition the charge already given in behalf of the accused. If the court, in substance, gives the charges asked, there is no error of which the accused can complain. (*Boyce v. Cal. Stage Co.* 25 Cal. 460; *Territory v. Corbett*, 3 Mont. 50.)

The fourth objection is to the refusal of the court to permit one of the grand jurors to answer the question as to whether he knew what was legal evidence. A motion had been filed to set aside the indictment because the grand jury had found the same upon illegal evidence. Section 145 of the Criminal Practice Act directs that in the investigation of any charge for the purpose of finding an indictment the grand jury shall receive none but legal evidence. In the very nature of things, the statute must be directory, and not mandatory. When we consider that the investigations before grand juries are often necessarily conducted by men not skilled in the law, and who are ignorant of the rules of evidence, it would be an impossibility to prevent evidence of this character from sometimes getting before the jury. It was never the intention of the law-makers that an indictment should

be set aside for any such reason, else it would have been enumerated as one of the grounds for such a motion in section 206, Criminal Practice Act. The statute merely directs the jury to conduct their investigations by means of legal evidence, and this they are to do to the best of their knowledge and information. And it is the duty of the jury to reject illegal evidence in their deliberations whenever they become aware of it. But the law of this Territory does not annul an indictment for such a cause, and the trial judge was correct in refusing to allow the question; it was irrelevant.

This brings us to the fifth ground in the motion for a new trial, and which contains the only serious reason why it should be granted. The defendant asked the court to instruct the jury that the prosecution should prove the value of the stolen animal, but the trial judge refused to do so, and instead thereof instructed the jury as follows: "In the crime of stealing a steer it is not necessary to prove that it is of any special value whatever, to constitute grand larceny, and this you may infer from any facts and circumstances which may be proven, in the absence of any direct evidence upon that point." Defendant complains that this instruction misstates the law. By the laws of the Territory, larceny is divided into grand and petit. The theft of property under fifty dollars in value is petit larceny, while to steal property of that or greater value than that sum constitutes the crime of grand larceny. But whoever steals a steer or certain other enumerated animals, of whatever value, commits the crime of grand larceny; the punishment for which is particularly specified in the section defining the crime. It is undoubtedly the common-law rule that the property stolen must have some appreciable value to be a subject of larceny, and prior to the time of George IV. it was always necessary to state the value of the stolen property in the indictment, in order to distinguish between the two offenses of grand and petit larceny, the punishment for the two crimes being different, and this is the reason for the rule as stated by East, Hale, and Blackstone. But when the distinction between grand and petit larceny was abolished, during the reign of George IV., it is not necessary to state or prove the value of the article stolen. (Archbold's Criminal Pleading and Practice, marg. p. 364. See "Form," marg. p. 354.)

In prosecutions for cattle stealing, under the statute which declares the theft of certain animals, whatever their value, to be grand larceny, it is unnecessary to allege or prove any particular value for the stolen animal. Only such domestic animals are enumerated by the statute as are universally acknowledged to be valuable, and the same punishment is meted out to the offender, without any regard to its value. That the property was of some value may be inferred by the jury from the facts and circumstances in the case, even though there be no direct testimony upon the point. There was no error in this instruction. (*Houston v. State*, 13 Ark. 66; *Lopez v. State*, 20 Tex. 781; *People v. Townsley*, 39 Cal. 405; *State v. Wells*, 25 La. An. 372; *State v. Thomas*, 28 La. An. 827; 1 Bishop on Criminal Procedure, § 315; Wharton's Criminal Procedure [8th ed.], § 215; Bishop on Statutory Crimes, § 427, and authorities there cited.) There are some decisions to the contrary effect, but they can all be readily reconciled upon some special reason or rule which does not apply in this case.

The last ground in the motion to set aside the verdict is evidently frivolous. Defendant insists that the court erred in denying the motion, "for the reasons stated in open court." Doubtless the reasons given by his counsel in open court why the verdict should be set aside were very convincing and conclusive to both the defendant and his counsel, but not having found them reduced to writing and contained in the motion, this court is relieved from considering them.

There is no error in the order appealed from, which is therefore affirmed, at cost of appellant.

BLAKE, C. J., and DE WOLFE, J., concur.

BACH, J. (*concurring*). — I agree with the result in this case, but I am forced to dissent from the reasoning of the majority opinion upon the fourth objection raised upon the appeal. The majority opinion seems to decide that an indictment cannot be quashed upon the ground that it was founded on illegal testimony, under any circumstances, and declares: "It was never the intention of the law-makers that an indictment should be set aside for any such reason, else it would have been enumerated as one of the grounds for such a motion in section 206 of the

Criminal Practice Act." I am of the opinion that said section permits the quashing of the indictment when it is not properly found, and when that fact is brought to the notice of the court through legal means. The majority opinion confines such a motion to the grounds of indorsement and presentment of the indictment, under subdivision 1, section 206. On the other hand, I find three grounds contained in that subdivision: 1st. When the indictment is not found as prescribed by this act. 2d. When the indictment is not indorsed as prescribed by this act. 3d. When it has not been presented as prescribed by this act. In other words, I think that a comma should be placed between the word "found" and the word "indorsed." I reach this conclusion because: 1st. The expression "found indorsed," as it occurs in the subdivision of section 206, means nothing more than "indorsed," the word "found" adding nothing to the word "indorsed." 2d. The expression "found" has a well-defined meaning in the criminal law regarding indictments. 3d. The section is evidently taken from the Code of California, and has been so construed. (See § 995, Deering's Pen. Code Cal., and case cited in the notes.) 4th. In the case of *Territory v. Hart*, 7 Mont. 42, Mr. Justice McLeary expresses the opinion which would seem to limit the meaning of the subdivision to the two grounds of indorsement and presentment; but it will be seen that the learned judge held that a motion would lie when based upon the improper finding. A reference to the California authorities sustains the result in the *Hart Case*, and further proves that the proper remedy was a motion to quash, upon the ground that the indictment was "not found as prescribed by this act." (See *People v. Southwell*, 46 Cal. 141; *People v. Colby*, 54 Cal. 37.)

I accept, then, the conclusion that a motion to quash an indictment may be based upon the ground that the same "was not found as prescribed by this act." It is necessary now to determine what is meant by the expression, "the finding of an indictment." The finding of an indictment is a proceeding which commences by an investigation undertaken by a grand jury, and based only upon legal testimony, and which ends by an indictment voted for by at least twelve members of the grand jury. It is the legally declared result of an investigation based upon legal evidence. If twelve members of the grand jury do not

vote in favor of the indictment, the indictment cannot be found; if there is not legal evidence before the grand jury, upon which an indictment can be based, an indictment cannot be found; and if it is made to appear to the court, at the proper time and through the proper channel, that less than twelve grand jurors voted for the indictment, or that there was no legal evidence before the grand jury upon which to base the indictment, then, in my opinion, the court should sustain a motion to quash the indictment upon the ground that "it was not found as prescribed by this act." There are many reasons why such a motion should be granted. The finding of an indictment raises a presumption of guilt in the minds of the people, especially when the grand jury is directed not to return an indictment unless in their opinion there is evidence before them sufficient "to warrant a trial jury in a conviction." Great expense is thrown upon the defendant, and upon the public, in defending and prosecuting the action. In my own short experience upon the bench, I had occasion to direct a jury to bring in a verdict "Not guilty" in a case where the defendant was charged with the crime of murder. The foreman of the grand jury afterwards told me: "We knew that there was no evidence before us to sustain the indictment, but we were told that evidence would be furnished at the trial, if we would find the indictment." The prosecuting attorney was not present at the investigation before the grand jury, and when the prosecution rested, and the motion was made by the defendant that the court direct the jury to return the verdict, "Not guilty," the prosecuting attorney promptly rose and declared that he could not resist the motion. Suppose that a motion to quash the indictment was made upon such a showing, admitted by the prosecuting attorney, could not the court grant the motion? If the defendant in the case was innocent, great injustice was done to him by the law, and a useless expense was thrown upon the people. On the other hand, if the defendant was guilty great injustice was done to the people, for the defendant is safe from further prosecution. It is the practice and the law to indorse upon the indictment the names of all material witnesses. This does not mean only the names of those who were before the grand jury. If it were shown to the court that there were absolutely no witnesses before the grand jury, or if it

were shown to the court that the only witness before the grand jury was incompetent, could not the court grant a motion to quash the indictment upon the ground that "it was not found as prescribed by the act?" I think that it would be the duty of the court to grant the motion.

The following cases are in point: *State v. Fellows*, 2 Hayw. (N. C.) 340. The opinion is short, and is herein given in full, (Taylor, J.): "The person who is to be entitled to a restitution of possession, in case of a conviction on an indictment of forcible entry, cannot be a witness on the trial; and if the indictment has been found on his single testimony, it ought to be quashed." In *State v. Froiseth*, 16 Minn. 296, a motion to set aside (or quash) an indictment was granted because the defendant was required by the grand jury to testify before them, and did so testify, concerning a charge against himself pending before them. The statute of Minnesota regulating the practice on and enumerating the grounds for a motion to quash an indictment is similar to the said section 206 in the Montana Compiled Statutes.

In *People v. Moore*, 65 How. Pr. 177, a motion to quash an indictment was granted upon the ground that it was improperly found. The motion was based upon affidavits showing that the wife of the defendant was introduced as a witness before the grand jury, without the consent and against the will of her husband, the defendant, and that her testimony was vitally material. The opinion of Osborn, J., in *People v. Briggs*, 60 How. Pr. 17, seems to present the proper rule, one which preserves the presumption of the validity of an indictment to the fullest extent warranted by law, and one which provides a remedy against the illegal action of a grand jury. The learned judge says (see p. 41): "The law requires, and the grand jury are always charged, that no indictment should be presented unless the guilt of the accused is clearly established by credible, legal, and competent testimony. It may be said, and truthfully, that no indictment could ever stand if it was to be set aside because some illegal evidence was admitted. The grand jurors are not lawyers, and it often happens that questions are put and evidence elicited that would not be allowed in court. Shall every indictment, therefore, be set aside? I answer, by no means. Where there is

sufficient evidence to warrant the finding of a bill, no court would set it aside for technical illegalities, which it is apparent did not and could not have influenced the action taken."

In the case referred to the learned judge granted the motion to quash the indictment. The motion was based upon an affidavit showing the same state of facts as appeared in the case of *People v. Moore, supra*. See, also, *People v. Hulbut*, 4 Denio, 135, in which that learned jurist, Mr. Justice Bronson, takes the same position. The authorities and citations seem to me conclusive upon the point that in some cases the law permits, and public policy demands the granting of a motion to quash an indictment upon the ground that the same was not properly found. I shall not undertake to enumerate the causes for which such a motion would lie. Without expressing any opinion as to the propriety of examining the grand jury in support of such a motion, I am firmly convinced that the court below was correct in not allowing defendant's counsel to ask the question which is made the ground of error in this appeal. The counsel asked the foreman of the grand jury this question: "Do you know what legal evidence is?" Whether or not the grand jurors did so know was immaterial. The only proper question of that nature would be: "Did the grand jury receive and act upon illegal evidence?" That question was put by the court, and was answered in the negative. There was no error in this ruling.

UNITED STATES, APPELLANT, v. KING ET AL., RESPONDENTS.

CANCELLATION OF PATENT—Pleading.—Under section 2825, Revised Statutes of the United States, the certificate of the surveyor-general is evidence of the sufficiency of the work performed and improvements made upon a mining claim in his State; and in an action to annul a patent it is error to strike out of the answer an averment that the surveyor-general for Montana took the evidence required by law, and decided that the defendants had performed work and placed improvements upon the claim of the value of five hundred dollars.

MINING CLAIM—Evidence.—Where the complaint in such action alleged in substance that the patentees did not discover any mineral lead, ledge, or vein of rock in place, bearing gold or other metals, and the evidence is conflicting upon the point, proof that the claim was deemed valuable for mining purposes was held sufficient, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit to constitute a mine within the meaning of the statute.

Appeal from Second Judicial District, Silver Bow County.

The cause was tried before GALBRAITH, J., at the December term, 1887. There was a general verdict and special findings submitted to the jury, and the findings were for the United States. A decree was drawn in accordance therewith, canceling the patent to the Hesperus lode. The plaintiff appeals from an order of DE WOLFE, J., at the May term, 1888, granting a new trial.

Robert B. Smith, United States Attorney, and *W. Y. Pemberton*, of counsel, for Appellant.

The granting or refusing of a new trial is a matter in the discretion of the trial judge. Especially is this true where the evidence is conflicting. (*Chauvin v. Valiton*, 7 Mont. 584.) But we apprehend that this statement and the opinion above cited ought to be taken *cum grano salis*. We do not believe that it was intended by the court in the above opinion to say that in a chancery case, where the judge made and adopted his own findings, and where he was not bound by the findings of the jury, that his successor, or any other judge, ought to grant a new trial on the facts where the evidence is conflicting. The true rule is laid down in *Orr v. Haskell*, 2 Mont. 225.

If the complaint was defective in not showing that the action was brought by the authority of the attorney-general the respondents should have pointed out the defect in their demurrer, or else have demurred for want of proper parties, under the fourth subdivision of section 87, Code of Civil Procedure. If the action should not be brought except on the order of the attorney-general, this authority was shown on motion for new trial, and can be shown on appeal. (*United States v. Western Pacific R. R. Co.* 108 U. S. 510, 511.)

The United States government can maintain an action to cancel its own patent where it is charged that the patent was procured by fraud, notwithstanding the fact that the officers of the interior department or the general land office have passed upon the proof adduced on the application. (*Moffat v. United States*, 112 U. S. 24.)

There was no error in the instruction given by the court,

defining what class of lands is patentable as mineral land. (*Deffebach v. Hawke*, 115 U. S. 392.)

W. W. Dixon, and *William Scallon*, for Respondents.

A patent, even if it be obtained by fraud, conveys the legal title, and grantees of patentees also take such title. (*Smelting Co. v. Kemp*, 106 U. S. 447; *United States v. Minor*, 114 U. S. 241; *Colorado & I. Co. v. United States*, 123 U. S. 307.) If *bona fide*, patent cannot be canceled. (*United States v. Minor*, *supra*; *Colorado & I. Co. v. United States*, *supra*; *United States v. Marshall M. Co.* 129 U. S. 579, in fine.)

The complaint is insufficient in that it does not allege any tender of the purchase money, or offer to return it. The defendants in their fifth defense averred that no offer had been made to return the amounts paid out by them in procuring the patent and the purchase of the land, nor had any demand been made for the surrender of the property. The court erred in striking out the defense. (*United States v. White*, 17 Fed. Rep. 561, and cases cited; *United States v. San Jacinto Tin Co.* 125 U. S. 273.) The decision in *United States v. Minor*, 114 U. S. 241, does not affect the principle as applied to the case at bar; for it rests entirely on section 2262 of the Revised Statutes of the United States.

The complaint does not allege any imposition on the surveyor-general's office, nor any collusion with the officers of plaintiff, but charges imposition upon the register and receiver by means of the affidavits alleged, admitting the filing of the papers required by law. The surveyor-general's certificate is therefore conclusive. (*United States v. Iron Silver Co.* 128 U. S. 685.)

The complaint should show the authority of the attorney-general for the action. (*United States v. Throckmorton*, 98 U. S. 68; *United States v. San Jacinto Tin Co.* 125 U. S. 273.)

A patent cannot be set aside where the evidence is conflicting, or where there is a preponderance merely. (*United States v. Maxwell Land Grant Co.* 121 U. S. 325; *Colorado Coal and Iron Co. v. United States*; *United States v. San Jacinto Tin Co.*; *United States v. Marshall M. Co.*, and *United States v. Iron Silver Co.*, already cited.)

The claim of appellant is, that to be open to location or

patent, a vein must actually be shown up to be of sufficient extent and value for profitable mining. In other words, that a mine must be discovered. This is clearly erroneous. (*Iron Silver Co. v. Cheesman*, 116 U. S. 529; *North Noonday Co. v. Orient Co.* 9 Morrison, 529; 6 Sawy. 299; *Stevens v. Gill*, 1 Morrison, 576; *Foote v. National M. Co.* 2 Mont. 402; *Harrington v. Chambers*, 3 Utah, 94.)

BLAKE, C. J.—The jury in this case returned a general verdict and special findings, which were approved and adopted by the court, and a decree was entered accordingly. A motion for a new trial was heard and sustained by the successor of the judge who tried the cause, and from this order the appeal has been taken. The action was commenced for the purpose of canceling and annulling a patent which had been issued by the United States to the respondents for the “Hesperus” lode mining claim. The complaint alleges, in substance, that the respondents did not discover any mineral lead, ledge, or vein of rock in place bearing gold or other metals, and did not perform labor or make any improvements on the Hesperus Claim of the value of \$500. These constituted the main issues upon which the testimony was introduced. The transcript does not contain the reasons which influenced the action of the court below, but we have no difficulty at arriving at our decision. The highest court of the land has clearly defined the legal principles which govern this action. In *Maxwell Land Grant Case*, 121 U. S. 381, Mr. Justice Miller delivered the opinion, and said: “We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the

presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful." This doctrine has been affirmed in other cases. (*Colorado Coal Co. v. United States*, 123 U. S. 307; *United States v. San Jacinto Tin Co.* 125 U. S. 273; *United States v. Iron Silver Mining Co.* 128 U. S. 673; *United States v. Marshall Mining Co.* 129 U. S. 579.) In *Colorado Coal Co. v. United States*, *supra*, Mr. Justice Matthews, in commenting upon the language of Mr. Justice Miller, *supra*, says: "It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs, and establishing the conclusion to which they are directed, rests upon the government."

The evidence is before us, and fails to be of the quality that is required upon the questions in dispute of the United States in similar proceedings. Since the trial of this case in the court below, the decision in *United States v. Iron Silver Mining Co.* *supra*, was announced, and eliminated the issue respecting the value of the labor and improvements upon the Hesperus Claim. This seems to have been the main ground relied on by the government; and while the testimony is conflicting, the jury found such value to be the sum of \$377. The opinion by Mr. Justice Field is so plain as to render needless any further examination,

and we cite this excerpt: "The sufficiency of the work performed and improvements made upon each of the claims patented was shown by the certificate of the surveyor-general of the United States for the State in which the claims are situated. The statute makes his certificate evidence of that fact. (Rev. Stats. § 2325.) He was fully informed of the character and value of the labor performed, and improvements made, through his deputy, who had personally examined them, and estimated their cost, and also secured affidavits of others on that subject. Their sufficiency, both as to the amount and character, were matters to be determined by him from his own observation, or from the testimony of parties having knowledge of the subject; and in such cases, where there are no fraudulent representations to him respecting them by the patentee, his determination, unless corrected by the land department before patent issues, must be taken as conclusive. His estimate here, in both particulars, was subject to be examined by the department before the patents were issued; and any alleged error in it cannot afterwards be made ground for impeaching their validity." There is no testimony that the patentees in this case made any misrepresentations to the officers of the United States. On the contrary, the answer sets forth that the surveyor-general of the United States for Montana took the evidence required by law, and considered the affidavits of the surveyors, chainmen, and other officers, and also of disinterested witnesses, and decided that the respondents had performed work and placed improvements upon the Hesperus Claim of the value of at least \$500. The court sustained the motion of counsel for the appellant to strike out this averment as being immaterial; and it is now apparent from the recent decision of *United States v. Iron Silver Mining Co. supra*, that this ruling was erroneous.

It will be seen from a slight investigation that the evidence upon the remaining issue is not "clear, convincing, and unambiguous" for the United States. The complaint alleges that the tract in controversy, before the location of the Hesperus Claim, "was vacant mineral lands of the United States." Michael Hickey filed an adverse claim during the period when the application of the respondents for a patent was being advertised; and among other findings by the jury is one that a min-

eral-bearing quartz vein was discovered by King *et al.* within the boundaries of the Hesperus Claim. There was also a contest with the owners of the Yellow Jack Claim; and one of the witnesses for the appellant stated, on cross-examination, "I have jumped this ground for a quartz claim." These facts tend to prove that the Hesperus Claim was deemed valuable for mining purposes. It is not necessary to analyze the testimony, but it is sufficient to say that there is a substantial conflict upon this subject. The jury evidently acted upon the theory—which some expressions in the instructions appear to support—that the respondents were obliged to show that there was a reasonable probability that the Hesperus Claim would become a source of profit to constitute a mine, within the meaning of the statute. This matter is no longer debatable. In *Iron Silver Mining Co. v. Cheesman*, 116 U. S. 538, a charge of the court below was approved that embodied this definition: "On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure; and if, in such fissure, ore is found, although at considerable intervals, and in small quantities, it is called a 'lode' or 'vein.'" (See, also, *Moxon v. Wilkinson*, 2 Mont. 424; *Foote v. National Mining Co.* 2 Mont. 402; *Freezer v. Sweeney*, 8 Mont. 508; *Overman Mining Co. v. Corcoran*, 15 Nev. 147; *North Mining Co. v. Orient Mining Co.* 6 Sawy. 299.) When these authorities are applied to the evidence in the record, the result will be unfavorable to the appellant. The order of the court in sustaining the motion for a new trial is affirmed, with costs.

LIDDELL, J., and BACH, J., concur.

SILVER BOW COUNTY, APPELLANT, v. STRUM-
BAUGH, RESPONDENT.

CONSTITUTIONAL LAW—*Criminal costs.*—Section 463, third division, Compiled Statutes, creating a lien upon the real estate and mining claims of any person for the payment of any judgment for fine or costs, which may be imposed upon him for a criminal offense, such lien to take effect from the time of his arrest, is not unconstitutional, and does not encumber his property without due process of law.

JUDGMENT — Foreclosure of lien. — Where the defendant in such case conveys the property after arrest and before the judgment is docketed, the proper remedy for the enforcement of the judgment is an action against the defendant and grantee to foreclose the lien.

Appeal from Second Judicial District, Silver Bow County.

DE WOLFE, J., sustained the demurrer to the complaint.

William H. De Witt, for Appellant.

Robinson & Stapleton, for Respondent.

BLAKE, C. J. — The appellant, as the board of county commissioners of the county of Silver Bow, commenced this suit to recover the costs of a criminal action, and obtain a decree for the sale of certain real estate. The court below sustained a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and upon the failure of the county attorney to amend his pleading, entered a judgment for the respondent. The following allegations of this complaint must be deemed facts upon the hearing of this appeal: Charles Clayton was arrested August 10, 1887, in Silver Bow County, by the sheriff, upon the charge of the murder of Zedoc C. Maddux. The grand jury of said county, at a term of the District Court, returned October 6, 1887, a bill of indictment charging said Clayton with the crime of murder in the first degree for the killing of said Maddux. At a regular term of said court, the jury in the case of the Territory of Montana against said Clayton returned May 23, 1888, a verdict of guilty of murder in the second degree. Said court sentenced said Clayton, June 15, 1888, to imprisonment in the territorial prison for the term of fifteen years, and ordered that a civil judgment be entered against him for the costs of the prosecution of said cause, amounting to the sum of \$1,581.65. Said judgment was then entered, and has not been satisfied, and there was due to the appellant thereon at the commencement of this action the sum of \$1,617.14. On August 10, 1887, when said Clayton was arrested, as hereinbefore set forth, he was the owner of certain real estate in said county of Silver Bow, consisting of land containing about eighty acres, and a water right. William H. Strumbaugh, the respondent, purchased of said Clayton, Novem-

ber 5, 1887, said real estate, and received a deed therefor, which is recorded in the records of said county. It is alleged in the complaint that by virtue of "the arrest, indictment, trial, conviction, and sentence of, and the judgment for costs against, the said defendant, Charles A. Clayton, a lien was created and now exists in favor of the plaintiff for said sum of \$1,617.14 against the said real estate and water right above described; that the plaintiffs are now the lawful owners of said judgment and claim aforesaid and of said lien." The statute of the Territory on which this action is founded is as follows: "In all cases when a person shall be arrested for any criminal offense, his real estate and mining claims shall be liable for the payment of any judgment imposing any fine or costs upon such person, and such judgment shall be a lien on such real estate or mining claims from the time of such arrest." (Comp. Stats. div. 3, § 463.)

The chief question for our decision involves the power of the legislative assembly to enact this law. The respondent insists that the statute is unconstitutional; that the mere arrest, with or without process of law, subjects the real property of the accused to a lien dating from such arrest, and thereby encumbers such property without any hearing, adjudication, or legal process. No authorities are referred to in the brief of the respondent to uphold this point, and only one case, that of *McKnight v. Spain*, 13 Mo. 534, has been called to our attention by the appellant. The statute of the State of Missouri, which is cited in the opinion of the court, is in these words: "The property, real and personal, of any person charged with a criminal offense shall be bound from the time of his arrest or finding the indictment against him (whichever shall first happen) for the payment of all fines and costs which he may be adjudged to pay." (Rev. Stats. 1845, p. 887, § 30.) It appears that Spain had in his possession, when arrested, a watch and a \$100 bank-note; that he was convicted of the crime of grand larceny, and sentenced to pay the costs of the prosecution; and that he conveyed, by a bill of sale to his attorney, this property "shortly after his arrest" and before his conviction. The court held that the State had a lien on his property, which could not be divested by the assignment made to the attorney, and could retain it to pay said costs. We are unable to perceive any legal distinction in the

power of the legislature which has created this and other statutory liens to protect private and public parties. Mr. Jones, in his valuable treatise on Liens, says: "But modern legislation has in many instances gone beyond the liens previously recognized at law or in equity, and has created a great number of new liens; and the tendency of legislation in this country is to extend still further this remedy for the protection of all persons who labor or supply materials for others, and for the protection of the State and of municipal corporations in the enforcement of taxes and other claims." (Vol. 1, § 97.) The learned author cites as an illustration of the latter, and approves, the case of *McKnight v. Spain*, *supra*. (Vol. 1, § 100.) The Supreme Court of the United States, in *Provident Institution v. Jersey City*, 113 U. S. 506, held that the act of the State of New Jersey, making water rates upon lands in Jersey City a lien prior to any encumbrances, was not repugnant to the Constitution. Mr. Justice Bradley, after stating the facts, says: "When the complainant took its mortgages it knew what the law was. It knew that by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water as regulated and exacted by them would be a first lien on the lot. It chose to take its mortgages subject to this law, and it is idle to contend that a postponement of its lien to that of the water rents, whether after-accruing or not, is a deprivation of its property without due process of law." In the case at bar, three months after the arrest of Clayton, and one month after his indictment for the commission of the offense of murder, the respondent purchased the real estate of Clayton. It must be presumed that he had knowledge of the statute, *supra*, which affixed a lien to this property to secure the payment of the costs which might be recovered by the people against Clayton. His condition was the same as the vendee of real estate, which is subject to be taken by the government for the non-payment of taxes by the vendor. The arrest, indictment, trial, and conviction of Clayton, and the judgment assessing the costs, have been regular, and the appellant was entitled to the lien defined in the complaint. The complaint prays that the real property in controversy be sold to satisfy the judgment which was entered against Clayton. The contention of the respondent is that the

sole means of enforcing this demand is by execution. But the statute requires the sheriff to satisfy the judgment out of the real property belonging to Clayton on the day when it was docketed, or at any time thereafter. (Comp. Stats. div. 1, § 313.) The title to the premises was vested in the respondent more than seven months prior to the docketing of the judgment, and the issuance and levy of the execution would not afford any relief to the appellants. The Criminal Practice Act provides that nothing in the statute, *supra*, "shall be construed so as to prohibit the issuing of execution, and the enforcing the collection thereof out of any other property of the defendants than above enumerated." (Comp. Stats. div. 3, § 464.) This seems to contemplate that this process shall not be resorted to when it relates to the real estate that is subject to the lien. In *Cairo R. R. Co. v. Fackney*, 78 Ill. 120, Mr. Justice Walker, in the opinion, said: "Liens are enforceable in equity unless the law has provided for another mode. This is true of vendors' liens, equitable and other mortgages, and all statutory liens, so far as they now occur to us, except in all cases where the lien is in the nature of a pledge, and possession accompanies the lien." We are satisfied that the appellants sought the rightful remedy in this action. It is therefore ordered and adjudged that the judgment of the court below be reversed, and that the cause be remanded, with directions to overrule the demurrer, and proceed in conformity with this opinion.

LIDDELL, J., and BACH, J., concur.

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BENEDICT, RESPONDENT, v. SPENDIFF, APPELLANT.

JUDGMENT BY DEFAULT—Excusable neglect.—Where a motion to open a default was made on the same day it was taken, and was supported by an affidavit showing that the defendant was sued in his official capacity as sheriff, and that on the day after the service of the summons was injured in the discharge of an official duty, by reason whereof he inadvertently neglected to employ counsel, and the answer tendered alleged a good defense; *held*, that under section 116, Code of Civil Procedure, the neglect was excusable and the default should be set aside.

Appeal from Third Judicial District, Yellowstone County.

A motion to open the default was denied by LIDDELL, J.

O. F. Goddard, for Appellant.

The matter of setting aside or refusing to set aside a default rests much in the discretion of the court below; yet the discretion is not a mental discretion to be exercised *ex gratia*, but is a legal discretion, to be exercised in conformity with law. (*Bailey v. Tuaffe*, 29 Cal. 423.) As a general rule, when the circumstances are such as to lead the court to hesitate upon a motion to open a default, it is better to decide in favor of the applicant. (*Watson v. San Francisco & Humboldt Bay R. R. Co.* 41 Cal. 17; *Reidy v. Scott*, 53 Cal. 69; *Roland v. Kreyenhagen*, 18 Cal. 455.)

Turner & Burleigh, for Respondent.

The application of the appellant in the court below to open the default was without merit, and showed culpable negligence on his part, from which the court could not relieve him without an abuse of its discretion. (*Donnelly v. Clark*, 6 Mont. 135; *Whiteside v. Lebcher*, 7 Mont. 373; *Bailey v. Taaffe*, 29 Cal. 423; *Nickerson v. Cal. Raisin Co.* 61 Cal. 268; *Elliott v. Shaw*, 16 Cal. 378; *Whipley v. Flower*, 6 Cal. 632.

DE WOLFE, J.—Appeal from a judgment of the Third District Court rendered against the defendant on default. The record shows that the defendant was served, or admitted service of summons, on the third day of April, 1889; and failing to answer or demur to the complaint within the time allowed by law, the 15th of the month, plaintiff took a default and judgment against him. On the same day the defendant filed a motion and affidavit to open the default. The affidavit alleges that the defendant was the sheriff of Yellowstone County, and while in the discharge of his official duties, on the day following the service of summons, received some personal injuries while crossing a ferry, and by reason thereof inadvertently neglected to engage counsel in the suit against him. The affidavit also shows that the suit was against him, in his official capacity as sheriff, for levying upon and selling certain personal property claimed by plaintiff. In the answer which the defendant tendered, and

which is contained in the record (whether properly or not we do not say), the ownership of the plaintiff of the property is denied ; and it is therein alleged that at the time of seizure and sale it belonged to D. A. Benedict, the husband of plaintiff, and that it was sold under execution issued against him. The affidavit and answer, if true, set up a complete defense to the cause of action sued upon. The court, however, refused to set aside the default, and rendered judgment against defendant for three hundred and forty-five dollars. To review this action of the court, this appeal has been taken.

From the dates recited it will be seen that there was no neglect or delay on the part of the defendant in moving to set aside the default immediately after it was entered. The motion and affidavit for this purpose were made on the same day of the default, while the answer was prepared and tendered a day or two later. We have, then, only to consider whether the defendant, upon the showing made, was entitled to the indulgence asked in having the default set aside. Questions of this kind must be decided from the facts of each case; the aim being to grant the relief where the neglect or inadvertence was unintentional or excusable, and where diligence is shown in correcting the error, and to withhold it when it proceeds from carelessness or indifference. A party in default who avails himself of the earliest opportunity to correct his mistake is certainly entitled to more consideration from the court than one who delays applying for relief, as well after as before the mistake is known. The law in this as in other particulars favors the vigilant. It is impossible to lay down any precise rule on the subject, and the authorities do not attempt to do so. The statute itself furnishes as safe a rule as can be formulated when it says: "The court may . . . upon such terms as may be just, and on payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." (Code, § 116.) If we apply the rule thus laid down to the facts set forth in the affidavit of defendant, it would seem that such a showing was made as entitled the defendant to have the default set aside, and to permit him to interpose the defense set up in his answer. We are aware that decisions can be found sustaining and reversing

the action of trial courts on questions of this kind; but from these decisions no exact rule can be deduced. In the case of *Watson v. San Francisco etc. R. R. Co.* 41 Cal. 20, the court says: "As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend, in a reasonable degree at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

The above, we think, recites the correct principle which should guide courts on a question of this kind. We are referred to the cases of *Whiteside v. Logan*, 7 Mont. 373, and *Donnelly v. Clark*, 6 Mont. 135, as holding that the action of the trial court should not be reversed on a question of this kind, unless there was a manifest abuse of discretion. The principle we do not deny, but the facts in both those cases were so unlike the present that the decisions are inapplicable as authority. We think there was an abuse of discretion on the part of the court in refusing to set aside the default on the showing made in this case, and for this reason the judgment is reversed, and cause remanded, with directions to the District Court to set aside the default, and admit the defendant to answer.

Judgment reversed.

BLAKE, C. J., concurs. BACH, J., expresses no opinion.

WILLISTON, RESPONDENT, v. CAMP ET AL., APPELLANTS.

PLEADING—Amendment.—It is not error for the court to allow an amendment to a pleading after the evidence is in, in order that the allegations may correspond with the proofs adduced, where such amendment does not change the nature of the action or mislead the adverse party to his prejudice.

PARTNERSHIP—Dissolution—Assignment.—Where partners made an assignment for the benefit of creditors, and afterwards executed a note in the firm name, which act was followed by a formal dissolution, *held*, that the assignment suspended but did not dissolve the copartnership, and the firm was liable upon the note.

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Appeal from Third Judicial District, Yellowstone County.

The cause was tried before LIDDELL, J., without a jury.

STATEMENT OF THE FACTS.

The plaintiff Williston sued the defendants as copartners on a promissory note for \$3,000, which the complaint alleges the defendants executed on the fifteenth day of January, 1887, payable to the order of the Williston-Camp Company, a corporation, one day after date, with one per cent interest per month, and attorney's fees if collected by suit. The plaintiff sues as the assignee of the note. The answer is a denial of indebtedness or any liability on the part of defendants on said note, and a denial that the firm of Camp Bros. ever executed the note. The answer further sets up as an affirmative defense the allegation or fact that the defendants, Camp Bros., on the 9th of July, 1881, made a general assignment of all their property, both real and personal, to David C. Porter for the benefit of creditors; that possession was taken of said property under said assignment; that thereafter the firm of Camp Bros. ceased to do or transact any further business as a firm, and that by virtue of the assignment, and the acts done under it, the partnership theretofore existing between the defendants was dissolved; that the note in question was executed long after such dissolution, and though executed in the firm name by Charles D. Camp, one of the members of the former firm of Camp Bros., it was not done by authority of his former copartners, and they are not bound by his act in signing said note with the firm name. The replication is a denial of these allegations as far as relates to a dissolution of the firm at the time of the assignment, and the authority of Charles D. Camp to execute the note in the name of the firm. The cause was tried by the court without a jury. In rendering its decision, the court made many special findings of fact, and, as a conclusion of law therefrom, rendered a judgment in favor of plaintiff for \$2,373.41 and costs. The difference between the judgment and the amount due on the note was the proceeds of certain collaterals, collected by the plaintiff, delivered with the note at the time of its execution. The claim for attorney's fees called for by the note, and asked

for in the prayer of the complaint, was not allowed for want of proof as to value. After the evidence on both sides had been submitted, the court permitted the plaintiff to amend his complaint to conform to the evidence on his part that the note was given in good faith for \$3,000 advanced to Porter, the assignee of Camp Bros., and which was used and applied by him for their benefit, and with full knowledge on their part of the entire transaction. The defendants objected to the allowance of this amendment, claiming that it changed the nature of the action. An exception was taken to the ruling of the court in allowing the amendment. Without reciting at length the various facts found by the court, it will be sufficient, for the purpose of this decision, to state their general purport, which was that the firm of Camp Bros., composed of Edgar B. and Charles D. Camp and S. A. Wallace, on the 9th of July, 1886, made an assignment of all their property to David C. Porter for the benefit of creditors, which trust Porter accepted; that while this trust was in existence, and Porter in possession of the trust property, overtures or negotiations took place between him and the creditors of the firm of Camp Bros., by which the creditors agreed to accept 66 $\frac{2}{3}$ per cent of their claims against Camp Bros. in full discharge and satisfaction therefor; that the assignee lacked at the time \$3,000 of enabling him to accept the offer thus made; that the offer was an advantageous one to the firm, or the members of the late firm of Camp Bros., inasmuch as it would save to them several thousand dollars, and release to them valuable property held by the trustee, and which otherwise would have to be applied in payment of their debts; that in the emergency in which they were placed, the members of the firm of Camp Bros. applied to the Williston-Camp Company for the loan of \$3,000 to enable them to make this compromise or settlement with their creditors; that the money was lent, and the note in suit executed in consideration therefor; that all the members of the firm of Camp Bros. were present pending the negotiations for the loan of said money, and were fully conversant with the transaction; that the note was executed and delivered, in their presence, in the name of the firm of Camp Bros.; that none of them dissented or objected to its execution, and the funds derived therefrom were used by Porter, the assignee, for the

purpose of settling the indebtedness of the firm, which they also knew; and thereafter he released to the different members of said firm the property remaining in his hands. At the time this was done the defendants formally agreed to a dissolution of the firm of Camp Bros., and articles to that effect were then for the first time signed. The above, with such additional facts as are contained in the opinion of the court, are all that it is deemed necessary to state.

McConnell, Carter & Clayberg, for Appellants.

The court erred in holding the defendant Wallace liable upon said note from the findings of fact handed down by him. A general assignment of all the partnership effects is in law, *ipso facto*, a dissolution of the partnership. (*Wells v. Ellis*, 68 Cal. 245; *Story on Partnership*, § 101.) The assignment of one of the partners of his interest in the partnership property works a dissolution. (*Parsons on Partnership*, p. 431.) The bankruptcy of one of the partners also operates as a dissolution of the partnership. *A fortiori*, a general assignment by all the partners, will, in law, operate as a dissolution of the partnership. (3 Kent Com. 53, 54.) In general, as to the consequences of a dissolution of a copartnership, see 3 Kent Com. 63, and n.; *Bank of Montreal v. Page*, 98 Ill. 120; *Palmer v. Dodge*, 4 Ohio St. 21; *Wilson v. Forden*, 20 Ohio, 89; *Haddock v. Crocheron*, 32 Tex. 276; *Curry v. White*, 51 Cal. 530; *Smith v. Sheldon*, 35 Mich. 42; *Pirrin v. Keene*, 19 Me. 355; *National Bank v. Norton*, 1 Hill, 572; *Mitchell v. Ostram*, 2 Hill, 520; *Hamilton v. Seaman*, 1 Ind. 185. The effect of a voluntary dissolution of partnership is to revoke the agency of each partner, except so far as it may be necessary to wind up the partnership affairs. (*National Bank v. Norton*, 1 Hill, 575; *Hamilton v. Seaman*, 1 Ind. 185.) There is no finding of facts in the record which, in law, shows that Wallace ever gave Charles Camp authority to bind him by the use of the firm name in the execution of the note sued on. It is not pretended that Wallace knew the contents of said note, or that he authorized the firm name to be signed thereto; but the court, as a conclusion of law, from his bodily presence when the note was executed, and his failure to enter any protest or dissent to the use of the firm name, finds that he "may be

said to have empowered Charles Camp to sign the firm name." Such finding is wholly insufficient to meet the requirement of law. (*Galliot v. Pl. & Mech. Bank*, 1 McMull. 209; 36 Am. Dec. 256; *Bell v. Morrison*, 1 Peters, 370; *Le Roy v. Johnson*, 2 Peters, 186.)

E. N. Harwood, for Respondent.

The amendment of the complaint was made by leave of the court at the trial, before the cause was submitted, to conform to the evidence introduced and proved on the trial. The power of the trial court to allow an amendment of this nature has been held in not a few Montana cases, with none to the contrary. (*Wormall v. Reins*, 1 Mont. 627; *Hartley v. Preston*, 2 Mont. 415; *Hershfield v. Aiken*, 3 Mont. 442; *Randall v. Greenhood*, 3 Mont. 506; *Ramsey v. Cortland Cattle Co.* 6 Mont. 498.) A general assignment of all the partnership effects is not in law, *ipso facto*, a dissolution of the partnership, as contended by appellant. (*Pleasants v. Meng*, 1 Dall. 380; Story on Partnership, §§ 97, 325, 326, and notes; Parsons on Partnership [3d ed.], pp. 420, 421, 422, 423; Gow on Partnership, 253; 1 Parsons on Notes and Bills, 144.) The case cited by appellant (*Wells v. Ellis*, 68 Cal. 245) is a case for accounting between partners, and not in point. The relation of partners between themselves is viewed differently in law than between the firm and a creditor thereof seeking to recover his just debt. (*Manville v. Parks*, 7 Colo. 128.) The power of a partner to bind the firm after dissolution on transactions for settling up the affairs of the partnership is affirmed in the leading case of *Estate of Davis and Desauque*, 5 Whart. 530; 34 Am. Dec. 574. (See, also, *Houser v. Irvine*, 3 Watts & S. 345; 38 Am. Dec. 768; *Brown v. Higginbotham*, 5 Leigh, 583; 27 Am. Dec. 618; Parsons on Partnership [3d ed.], pp. 420, 421, 422, 423; Story on Partnership, § 17, and notes, §§ 325, 326, and notes; Gow on Partnership, 253; *Graves v. Merry*, 6 Cowen, 701; *Smith v. Hill*, 45 Vt. 90; *Cane v. Battle*, 3 La. An. 642; *Prudhomme v. Henry*, 5 La. An. 700.)

Leaving that view of the case, we assert on behalf of the respondent that the defendants all stood by and expressly negotiated the transaction involved in this action, and accepted and carried away the fruits and profits of it. It seems clear, under

the authorities cited, and the findings of fact in this action, that the defendants would be liable as partners for the repayment of said three thousand dollars, if they had never been partners before. They formed a partnership then and there by jointly negotiating the transaction and sharing the fruits and profits of the same. What more is necessary under the law to constitute a partnership? An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature in every definition of the term. (See Ewell's Lindley on Partnership, parts 1, 2, 3, where many definitions are collected; 2 Bouvier's Law Dict. 367; *Randolph v. Peck*, 1 Hun, 138; *First Nat. Bank v. Parsons*, 19 Minn. 289; 3 Kent Com. 27.)

DE WOLFE, J. — The first question presented for determination is the correctness of the ruling of the court in permitting the amendment of the complaint, after the evidence was all in, so as to make the complaint correspond with the proofs adduced. This the defendants allege as error, claiming that the amendment changed the nature of the action from one on a promissory note to an action for money loaned, or money had and received, and the amendment called for an answer different from that made to the action on the note. The objection we think specious, rather than real. The amendment asked and granted did not, in our view, change the nature or character of the action. It remained after as well as before one upon the promissory note. The court must have found from the evidence that the defendants were liable upon the note; otherwise it could not have rendered judgment against them. Any doubt as to this is set at rest by the facts which the court actually found and filed in the cause. In one view, the amendment may appear immaterial. If the defendants borrowed the money, and executed their note therefor, the use which they made of the money is no doubt unimportant as affecting their liability to repay it. While this is so, we hold that it was not error in the court to permit an amendment, the effect of which was only to show that the defendants received the benefit of the consideration for which they had executed their note. Besides, our statute is very liberal in the

allowance of amendments. The Code of Civil Procedure (§ 112) provides: "No variance between the allegations in a pleading and the proofs is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." We do not think the amendment in this case could properly mislead or injure the defendant in maintaining his defense on the merits; and the decision of the court, from the facts found, must have been the same, whether the amendment had been allowed or not.

We come next to the consideration of the main question involved in this appeal, which is as to the liability of the defendants on the note sued on in this action. In other words, was it the note of the defendants? The answer to this involves the determination of two other questions. One is, did the assignment made by the defendants on the ninth day of July, 1886, operate, *ipso facto*, as a dissolution of the firm from that date? If it did, it gives rise to the other question, which is, did Charles D. Camp have authority from his former partners to execute the note in the firm name, or did they afterwards ratify his act by their words or conduct, or both?

The authorities generally lay down the proposition that a partnership continues in a qualified or limited sense after dissolution; but this, for the purpose only of settling its affairs, collecting its demands, and paying its debts; that for this purpose the persons composing the partnership continue as agents of the partnership, and, unless restricted by agreement among themselves, one of the former partners has the same power in this respect after as before a dissolution of the partnership. But the power is limited to a settlement of past transactions, and does not extend to the formation of new contracts, nor to change the nature or form of existing contracts. Chancellor Kent lays down the principle in the following clear and succinct form: "The power of one partner to bind the firm ceases immediately on its dissolution, provided the dissolution be occasioned by death or bankruptcy, or by operation of law; though, in cases of a voluntary dissolution, due notice is requisite to prevent imposition on third persons who might continue to deal with the firm. The partners from that time become distinct persons, and tenants in common of the joint stock. One partner cannot

indorse bills and notes previously given to the firm, nor renew a partnership note, nor accept a bill previously drawn on it, so as to bind the firm. He cannot impose new obligations upon the firm, or vary the form or character of those already existing." (3 Kent Com. 63.) The principle here laid down is uniform, and further reference to authority is unnecessary.

On the question whether a general assignment for the benefit of creditors necessarily and of itself works a dissolution of a partnership, the authorities are somewhat scant, and less conclusive. In the present case the court found as a fact that the firm of Camp Bros. was not dissolved by the execution of the assignment in July, 1886; but the persons composing the firm agreed upon and signed articles of dissolution after the execution of the note, and during the same meeting or interview. In the absence of evidence to the contrary, all presumptions of law are in favor of the findings made by the court. If the firm of Camp Bros. was dissolved before that time, it must have been done by operation of law, and not by the act—at least, not by the intention—of the partners; for evidently they regarded themselves as partners up to that time, or they would not then have agreed upon and signed articles of dissolution.

Judge Story, in his work on Partnership, in discussing the power of one partner to make a general assignment for the benefit of creditors, questions the authority to do so, and gives as a reason that such a power "would seem to amount of itself to a suspension or dissolution of the partnership." (Story on Partnership, § 101.) When we analyze this language, we are not certain that the author intended to lay down any absolute and fixed rule that a general assignment for the benefit of creditors, *ipso facto*, operated as a dissolution of a partnership; otherwise he would not have said that such an assignment operated as a "suspension or dissolution" of a partnership. There is a vast difference between the dissolution of a partnership and a mere suspension in the conduct of its business or operations. The terms are not synonymous, and it cannot be that they were used by so accurate a writer as Judge Story in the same sense. He, no doubt, intended just what he said; and, applying his language to the facts of this case, it may be correctly said that the assignment made by Camp Bros., on the 9th of July, 1886,

“suspended” the business of that firm, without saying that it dissolved the copartnership. Partnership results from contract; and its dissolution, when not brought about by death, bankruptcy, or some operation of law, rests in the same source—the will or action of the partners themselves.

It would not be difficult to imagine cases where partners might desire and intend to continue a partnership between themselves after a general assignment of all property, and without entering into new articles, or making any new agreement as to the future; and if parties should so act and treat each other, and so deal with others, it would be rather a continuation of than the formation of a new partnership. This view of the nature of a partnership, and the causes which operate as a dissolution, is not without authority for its support. In the case of *Pleasants v. Meng*, decided by the Supreme Court of the United States at an early day, the court, speaking on the effect of a general assignment as affecting a dissolution, says: “Where there is no express agreement to make the dissolution, the assignment can only be considered as circumstantial evidence of it, which the defendant is at liberty to repel by contrary proof.” (*Pleasants v. Meng*, 1 Dall. 380.) In a very recent work on the subject of partnership, the author says: “An assignment for the benefit of creditors is not necessarily a dissolution of the partnership, but is *prima facie* evidence of dissolution.” (Parsons on Partnership, § 132.) This we believe a more reasonable, and therefore correct, rule than the one which holds that an assignment, *ipso facto*, in all cases, operates as a dissolution. It has, however, been held in California that a general assignment operated as a dissolution. (*Wells v. Ellis*, 68 Cal. 243.) The same doctrine was held in Maine in the case of *Simmons v. Curtis*, 41 Me. 375; but the question was not directly involved, and its decision was, in part at least, *dictum* of the court. The case of *Bank v. Horn*, 17 How. 157, referred to in the California case, is not an authority to the point.

Whatever may be the correct rule on this, there is no doubt upon the other proposition, that after dissolution the partners may delegate to one of their number the authority to execute a note in the name of the former partnership, or they may ratify the act when done, and, if they do either, the firm becomes

bound. If they do both, it follows, *a fortiori*, they are likewise bound. In the present case the court found, as matters of fact, that the defendants were all present when the note was given, and all knew of its execution, and the object and purpose for which it was done; also that they received the benefit of the proceeds by the relinquishment of property which would otherwise have been applied in payment of the debts of the firm. It is impossible to doubt, therefore, but what there was both a delegation of authority to the partner who executed the note, and a ratification of his act after it was done. Numerous authorities could be cited which uphold this proposition, and no authority has been found to the contrary. We refer only to the following: *Eaton v. Taylor*, 10 Mass. 54; *Kelly v. Crawford*, 5 Wall. 785; *Simmons v. Curtis*, 41 Me. 375.

In every view taken of this case, we are of opinion that the judgment of the District Court should be affirmed, with costs, and it is so ordered.

BLAKE, C. J., and BACH, J., concur.

LITRELL ET AL., APPELLANTS, v. WILCOX ET AL.,
RESPONDENTS.

ASSUMPT — *Nonsuit*. — Where the plaintiffs sue for work and labor done in drilling a well for defendants at their request, the complaint containing a *quantum meruit* count, it is error for the court to grant a motion for a nonsuit upon the ground that "if there was any contract between these parties it was to sink a well containing other than surface water."

Appeal from Fourth Judicial District, Cascade County.

The action was tried before BACH, J.

C. H. Benton, for Appellants.

Thos. E. Brady, for Respondents.

DE WOLFE, J. — The appellants brought an action to recover the sum of five hundred dollars which the complaint alleges was due and owing to them by the defendants (respondents here) for

labor and services rendered in drilling for a well at the instance and request of defendants.

The defendant Wilcox only answered, and by his answer denied that plaintiffs drilled the well, and denies that services which plaintiffs performed were done at his instance or request, or that they were worth the sum charged therefor, or that anything remains due to plaintiffs on account of said services. The other defendant (Sutherland) appears to have made default, though as to that the record is silent. The complaint alleges and the answer does not deny that the defendant Sutherland paid one hundred dollars on account of the services for which the action is brought. The testimony also shows that this money was paid as alleged.

The record of the case is brought to this court in a very imperfect condition, and in the state it is in we would be justified in dismissing the appeal without considering the case on its merits. It does not directly appear from the record whether the case was tried by the court or by a jury, but it does state, as one of the grounds of error relied upon for a reversal, that the court erred in withholding from the jury the question whether, under the evidence, the plaintiffs had used due diligence in procuring machinery to sink the well, and whether or not the defendant Wilcox had not waived further performance on the part of the plaintiffs. The record is silent as to the verdict of the jury. It contains no judgment, and we look through it in vain to ascertain whether any was rendered. It contains no instructions given or refused, nor any bill of exceptions; nor is there any statement on appeal, or certificate of the judge before whom the case was tried, settling the statement on appeal, as required by the Practice Act.

To call so imperfect a group of papers the record of a court seems a misnomer, and we would be justified in withholding from it our consideration. But as counsel for respondents has let its imperfections pass unchallenged, and as it has been submitted to us, we have looked through it, in order to ascertain whether it discloses any error which would justify us in reversing the judgment, assuming that a judgment of some kind was rendered.

The record does, in an imperfect manner, disclose the fact that a motion for new trial was made in the case, and overruled by

the court, on account of "dismissing the cause upon the ground that drilling a well that should contain water other than surface water was a condition precedent to recovery of payment for the labor." The motion for new trial was also made on the ground that certain questions were improperly held from the jury; but as the record is silent as to any ruling of the court on the admission of evidence, or instructions to the jury, we can only infer that, after the evidence was submitted, the court sustained a motion to dismiss the action. If this is ~~not~~ so, the record is entirely unintelligible. Proceeding, then, upon this theory, we think the court erred in dismissing the action on the first ground mentioned in the motion for a new trial. It is evident from the pleadings that the court misjudged the nature of the action in sustaining the motion to dismiss on the ground stated.

The action is not one upon a contract to drill a well, in which the parties were to be paid if they succeeded in finding water other than surface water, or failing, were not to recover compensation for their labor. It was an ordinary complaint for work and labor done at the instance and request of defendants, and containing the usual *quantum meruit* count.

Viewing the pleadings in this light, we think the court erred in dismissing the action. The cause is therefore reversed, and remanded for a new trial. Judgment reversed.

BLAKE, C. J., and LIDDELL, J., concur.

BUDD, ADMINISTRATOR, APPELLANT, v. POWER, RESPONDENT.

WARRANTY — *Possession of stock on range.* — Cattle running on the public ranges are in the constructive possession of the owner, and upon a sale thereof a warranty of title will be implied.

Appeal from Third Judicial District, Gallatin County.

On rehearing. Same case reported in 8 Mont. 380.

No brief on file for Appellant.

Armstrong & Hartman, for Respondent.

BLAKE, C. J.—The respondents have filed a petition for a rehearing in this case, which is reported in 8 Mont. 380. It was held therein that the court below erred in deciding that the question of warranty of title to certain cattle did not arise. The findings of fact and conclusions of law are stated in the opinion, and it appears that the property was on the range at the time the promissory note sued on was executed by the respondent, and belonged exclusively at all times to one Ferris, who sold and delivered it to the Gallatin Mill Company; and that neither Scribner nor De Lancy had any interest or claim thereto. This court was of the opinion that the respondents must prove that the cattle were in the possession of De Lancy when the sale was made, and that the law would imply a warranty of title from this fact. The respondents contend that the testimony relating to this matter was overlooked, and that the evidence shows that Scribner had possession of the property; that he delivered to De Lancy a bill of sale of one half thereof, which was sufficient to transfer this stock on the range; and that De Lancy afterwards sold his interest to the respondents. The testimony, in our opinion, does not establish the claim of possession in Scribner; and the presumption to be drawn from the foregoing findings is that Ferris, while enjoying the ownership, also possessed the cattle. In *Dodge v. Jones*, 7 Mont. 121, Mr. Chief Justice McConnell, in discussing the question of the delivery of certain horses, says: "When they were on the range, the actual possession was in no one. The range was common pasturage for everybody, and the constructive possession accompanies the title."

The respondents also insist that the court did not weigh carefully the testimony of the witnesses, regarding the fraud and deceit of De Lancy. There is no finding that De Lancy knew that he had no title to the cattle, or that there was a conspiracy between De Lancy and Scribner to defraud the respondents. In the absence of proof to the contrary, the reasonable inference from the findings is that De Lancy believed that the bill of sale which he had received from Scribner transferred to him the interest in the property, which was sold by him to the respondents. The learned chief justice, in the opinion, referred to some exceptions to the doctrine of *caveat emptor*, which constitute the

foundation of this petition; but, under the issues made by the pleadings, they cannot be the subject of review at this time. We are therefore satisfied that the facts before the court were given due consideration at the last term, and that the application for a rehearing should be denied.

BACH, J., and DE WOLFE, J., concur.

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11	405

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80	158

9	101
41	544

DUTRO, APPELLANT, v. KENNEDY ET AL., RESPONDENTS.

FIXTURES—Foreclosure of mortgage.—Fixtures attached to the realty after the execution of a mortgage may be properly sold by the mortgage creditor, where no issue is raised in the pleadings upon the point.

SAME—Remedy for removal.—The remedy of a mortgage creditor against a mortgagor removing fixtures is by injunction, or an action for damages or claim and delivery where the removal is completed.

DAMAGES—Claim and delivery.—In an action of claim and delivery, where the demand for damages was for unlawfully detaining the property, a judgment for the amount expended in replacing the goods was improper, but could be recovered under proper pleadings.

Appeal from First Judicial District, Lewis and Clarke County.

The action was tried before WADE, C. J.

Sanders, Cullen & Sanders, for Appellant.

It cannot be doubted that machinery attached to the realty in the manner the testimony shows this machinery to have been attached, and necessary or convenient for the working of the property, becomes a part of the realty, and cannot be severed therefrom by the mortgagor, even though the same may have been placed on the property after the execution of the mortgage. (1 Washburn on Real Property [4th ed.], pp. 9–23; 1 Jones on Mortgages, § 429; *Winslow v. Merchants' Ins. Co.* 4 Met. 306; 38 Am. Dec. 369; *Gray v. Holdslip*, 17 Serg. & R. 413; 17 Am. Dec. 694; *Rickardson v. Copeland*, 6 Gray, 536; 66 Am. Dec. 426; *Rives v. Dudley*, 3 Jones Eq. 126; 67 Am. Dec. 232.)

The only question in the foreclosure case was as to the property embraced in the mortgage, and the questions as to what machinery had been placed on the property since its execution,

its character, utility, or necessity, and whether the same was so attached as to become a part of the freehold or otherwise, were not in issue in that case. These questions are raised for the first time in the case at bar, and are not rendered *res judicata*, as between the parties by the findings in the foreclosure case. (*Wood v. Jackson*, 8 Wend. 10, 16, 31, 36; *Washington etc. Packet Co. v. Sickles*, 24 How. 333, 343, 345; *Lawrence v. Hunt*, 10 Wend. 80; Cowen's and Hill's Notes to Phillips on Evidence, pt. 2, n., 121.)

The judgment is erroneous, as it is in favor of both defendants, although the testimony shows conclusively that the defendant, George S. Kennedy, had no interest in the property described in the complaint, or in any part of it. If it did not belong to the plaintiff, then this machinery was clearly the property of Charles S. Scheurman and Mrs. Clara Kennedy, whom the court finds to have been partners engaged in mining upon the claim whereon it was situated. At common law all actions relating to personalty, arising *ex delicto*, for wrongs done to the common property, were to be brought by the cotenants jointly, and one cotenant could not maintain trover or trespass. This is the general rule, and about the only exception is where one of the cotenants has become disqualified from maintaining the action. Upon this fact being shown the court will allow the other cotenant to maintain the suit for the aliquot parts of the damage. (*Putnam v. Wise*, 1 Hill, 234; *Haskell v. Jones*, 24 Me. 223; *Hall v. Page*, 4 Ga. 434; *Starnes v. Quin*, 6 Ga. 87; *Gilmore v. Wilbur*, 12 Pick. 124; *Parsons v. Boyd*, 20 Ala. 117; *Clarkson v. Booth*, 17 Gratt. 495.)

E. W. Toole, for Respondents.

The court upon the trial in the foreclosure suit found that the appellant was entitled to a lien upon claim No. 5, and the machinery upon the same at the date of the execution of the mortgage, which does not include that in controversy, and a decree was rendered accordingly. No one would doubt but that if the court had not assumed to determine in the foreclosure case what particular property was subject to the mortgage lien, the authorities cited by counsel for appellant would be applicable. It will be assumed that there was an express agreement in writ-

ing, if necessary, that this machinery should be subjected to the mortgage, and that it was put upon the premises accordingly; and that such was the real intent of the parties. (*Potter v. Cromwell*, 40 N. Y. 287; *Kelly v. Austin*, 46 Ill. 156; *Crippen v. Moorison*, 13 Mich. 36; *Eaves v. Estes*, 10 Kan. 314; 15 Am. Rep. 345, 351; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Hastings v. Farmer*, 4 N. Y. 396; 1 Jones on Mortgages, § 429.)

Articles affixed after the mortgage are sometimes *prima facie* regarded as chattels. (1 Jones on Mortgages, §§ 436—439.) And a subsequent agreement may make them such when a part of the realty. (6 Morrison Mining Rep. 62; *Merritt v. Judd*, 14 Cal. 59; *Fratt v. Whittier*, 58 Cal. 126; *Hendy v. Dinkerhoff*, 57 Cal. 3; Malland on Conveyances, 409—411.)

If appellant's solicitude about imaginary cotenants of respondents getting his part of the property or its value, he could have made them parties or brought them in under the statute. If his fear was that a second recovery might be had against him for an aliquot part, he could proceed likewise, or return the property to the party from whom he had wrongfully taken it and thereby relieve himself from further liability. As to effect of a judgment in replevin, see *Lomme v. Sweeney*, 1 Mont. 585; *Parchen v. Peck*, 2 Mont. 567.

This is the first time that the insufficiency of the evidence has been urged by counsel. There is a general statement in the motion for a new trial that the evidence is insufficient to support the verdict. It does not designate in what particular it is insufficient, nor does the statement contain any such designation. Had plaintiff in error designated this as a ground upon which he would rely in his statement, defendant in error would then be called upon to see that all the evidence upon this point was embodied in the record; as it is, it was the duty of the court and counsel to utterly disregard it. (*Pralus v. Pacific G. & S. Mining Co.* 35 Cal. 30; *Elder v. Shaw*, 12 Nev. 78; *Caldwell v. Greely*, 5 Nev. 258; *McWilliams v. Herschman*, 5 Nev. 263; *Love v. Sierra Nevada etc. Co.* 32 Cal. 639; *Morrill v. Chapman*, 35 Cal. 85; *Sanchez v. McMahon*, 35 Cal. 218; *Vilhac v. Biven*, 28 Cal. 409; *Walls v. Preston*, 25 Cal. 59; *Brady v. O'Brien*, 23 Cal. 244; *Hutton v. Reed*, 25 Cal. 483; *Patridge*

v. *San Francisco*, 27 Cal. 415; *Fitch v. Bunch*, 30 Cal. 208; *Parchen v. Peck*, 2 Mont. 567; *Lomme v. Sweeney*, 1 Mont. 584.)

There was no request in the replevin case to find what interest defendant had as a cotenant if it could be partitioned out in that way. (Rev. Stats. §§ 277, 280; *People v. De Lacey*, 28 Cal. 589; *Miller v. Steen*, 30 Cal. 403; *Cruess v. Fessler*, 39 Cal. 337; *Polhemus v. Carpenter*, 42 Cal. 386; *Logan v. Hale*, 42 Cal. 648.)

LIDDELL, J.—In order to correctly understand the points at issue in this case it is necessary to state at some length the facts involved. On the 28th of July, 1879, one Scheurman and George Kennedy were the owners in indivision of a certain mining claim situated in Lewis and Clarke County, and designated in the official survey thereof as lot "No. 54 C," in sections 9 and 16, in township 9 north, range 4 west, commonly known as claim No. 5 east from discovery claim on Park lode.

Kennedy's interest in the claim was standing in the name of R. S. Hale, either to protect it from the pursuit of his creditors, or to secure the payment of a certain sum then due to Hale. At the same time we find that Kennedy's wife, who was a sole trader, also owned three mining claims in her own right, and they were all engaged in mining in Lewis and Clarke County. For the purpose of conducting the business, Kennedy and wife, by power of attorney, authorized Scheurman to borrow money either on sale or mortgage of the property owned by either of them at the date of the instrument. Under this power of attorney Scheurman borrowed \$3,500 from one Branch on the 28th of July, 1879, and executed a note therefor, signed by himself, and with the names of Mr. and Mrs. Kennedy.

The money so obtained was used by George Kennedy in paying off his creditor, Hale, who on the 1st of August, 1879, at the former's request, made a title of Kennedy's undivided half interest in the claim (No. 5) to Scheurman; and on the 12th of August, 1879, the latter executed a mortgage on that lot and the property of Mrs. Kennedy for the purpose of securing the note which Branch held for \$3,500.

The mortgage was intrusted to Scheurman for registry in Lewis and Clarke County, and he in turn allowed Kennedy to

obtain possession of the instrument, by whom it was destroyed. Branch instituted suit against Scheurman, Kennedy, and his wife, but during the pendency of the litigation transferred his interests therein to Dutro, the present plaintiff, who successfully prosecuted the suit to a final judgment.

Now, the act of mortgage being destroyed, it became necessary to establish the contents, and upon what property it operated; and to that end the trial judge found that "the mortgage was executed in the usual form, upon the whole of claim No. 5, and embraced and covered the tools and machinery thereon, consisting of a steam-engine for operating, and the hoisting works, pumps, etc., and also lots 1, 2, and 3, belonging to Mrs. Kennedy."

After the execution of this mortgage the defendants placed a lot of new machinery upon claim No. 5, consisting of a boiler, engine, pump, drum, hoisting works, and connecting pipes. The boiler was set in brick and stone work, and the engine was placed upon a foundation of masonry and timber let into the ground about six feet, and securely fastened thereto by sixteen iron bolts, which passed through the foundation. The pump does not appear to have ever been securely fastened to the realty, but the rest of the machinery was all in place, and used for the purpose of working the mine.

This machinery was on the mine when the decree was rendered foreclosing the mortgage, and it was also on the property and in place when the mine was sold at sheriff's sale to the plaintiff for \$5,502.03 on the 12th of August, 1885, and at that time no objection was made to the sale of the machinery, either because it was not specifically mentioned in the mortgage, or for the reason that it was not a fixture.

Matters remained in this condition until a short time before the delays expired within which the right of redemption might have been exercised, when the defendant, George Kennedy, caused the masonry around the boilers to be torn down, with a view to removing the same, and actually removed the engine, first cutting the sixteen bolts by which it was moored to its foundation, taking also two joints of steam-pipe and other fittings connected with the engine, the drums, the pump, and a lot of wire cable used for hoisting.

The present suit of claim and delivery was instituted to recover this machinery, and damages for unlawfully withholding the same, and resulted in a judgment for the defendants. From an order denying a motion for a new trial, as well as from the judgment, the plaintiff prosecutes the present appeal.

Several errors of law are assigned in the motion, but, under the view which we have taken of the case, it will only be necessary to examine one of them. The case was tried without a jury, and the judge found that the machinery, except the pump, were fixtures, and could not be removed without injury to the realty; that it would cost \$500 to replace the same; that it was all put upon the claim after the mortgage; and that the pump was worth \$150; finally, that this machinery was not specified in the original decree of foreclosure, from which he concludes that the title thereto did not pass by the foreclosure sale, and the sheriff's deed made in pursuance thereof.

We agree entirely with the judge *a quo* in his findings, but his conclusions of law are erroneous, and the order and judgment appealed from must be reversed. The trial judge misconstrued the scope and effect of the decree in the case of *Dutro v. Scheurman*. Under the pleadings in that case it devolved upon the plaintiff to show the power of attorney, the execution of the note, and its consideration, the mortgage, its destruction, its terms, and the property upon which it was imposed; and when this was done the trial judge correctly found the property upon which it was intended to operate, to wit, the mining claim No. 5, and the machinery upon it at the date of its execution. And when, after his conclusions of law, the judge decreed that the plaintiff "was entitled, by virtue of such mortgage, to a lien upon the mining claim, and all the machinery and buildings which were upon and attached to the claim on the 12th of August, 1879," he merely reiterated the terms of the mortgage as it originally existed, and ordered the sale of the real property to satisfy the debt and mortgage. We have carefully searched the pleadings in that case, and can find no issue raised as to the right of the mortgage creditor to sell such machinery and buildings as may have been placed upon the real estate after the execution of the mortgage, in such a way as to become fixtures, and by designation a part of the real estate. Since the decree was

silent in this respect, and no such issue having been made, the right to sell such fixtures must be governed by the general rule which applies between mortgagor and mortgagee under such circumstances. Had the judge found and so decreed otherwise, the findings would have been disregarded as being outside of the issues. (*Marks v. Sayward*, 50 Cal. 57; *Gregory v. Nelson*, 41 Cal. 279.) In the foreclosure of a mortgage it is the undoubted right of the creditor, not only to sell such real property and fixtures as may be mentioned in the act, but also any improvements and personal property permanently attached to the realty, in such a way as to make it a fixture, and not excepted by the terms of the act. (*Sands v. Pfeiffer*, 10 Cal. 259; *Merritt v. Judd*, 14 Cal. 60; *Union Water Co. v. Murphy Fluming Co.* 22 Cal. 621; 2 Kent Com. 346; 2 Hilliard on Mortgages, p. 382, § 11.) Whenever the mortgagor endeavors to remove the fixtures or improvements upon mortgaged property, he may be enjoined, or the creditor may have his choice of an action for damages, or one of claim and delivery, after he has become the purchaser of the property at sheriff's sale, as in the present instance. Our conclusion is that the plaintiff was entitled to recover the machinery or its value, except the pump, which does not appear from the evidence ever to have been attached to the freehold in such a way as to enable us to say that it was a fixture.

Had the plaintiff framed his complaint properly, he would undoubtedly have been entitled to a judgment for \$500 on account of damages; for that is the amount proven to have been necessarily expended in replacing the machinery at the mine. But, upon examining his complaint, the demand for damages is for unlawfully withholding and detaining the goods, which is nothing more than a demand to be paid for the use of the property of which he has been deprived. No evidence was adduced under this demand, but the judge found that the cost of replacing the machinery was \$500. Any judgment for damages would therefore be outside of the issues, unless the proof supported the allegations in the complaint. The successful plaintiff in a claim and delivery suit, if in possession of the property, is entitled to a decree fixing his title, and to a judgment for such damages as he may have been occasioned by the acts of the defendant. But

where the latter is in possession the plaintiff is entitled to a judgment for the specific property, and, in default of its delivery, then to a moneyed judgment for the value of such machinery as it stood upon the mine, and not when severed from the realty. (*Rhoda v. Alameda Co.* 58 Cal. 357; *Whitbeck v. N. Y. Cent. R. R. Co.* 36 Barb. 644.)

It is therefore ordered that the order and judgment appealed from be reversed, and the cause remanded for a new trial, respondents paying costs of this appeal.

BLAKE, C. J., and BACH, J., concur.

KENNON, RESPONDENT, v. GILMER ET AL., APPELLANTS.

DAMAGES — Excessive verdict — Common carriers. — In an action for damages for injuries to the person where the evidence showed that the plaintiff was fifty-four years old at the time of the accident; that the large bone of his leg was broken and run through the skin; that the ankle joint was broken and the small bone shattered so that an immediate amputation of the foot was necessary; that it was over a year before the leg healed up, small pieces of bone coming out at different times; that he had been unable to walk without crutches; that an artificial foot caused him pain; that he was under medical treatment for two months, which cost him \$800; that his wound was very painful until it healed and at times afterwards; that he was deprived almost entirely of attending to his business, which would be more profitable if he could attend to it; that at times he was obliged to employ other help; that his general health was as good after as before the accident, but he was not as strong and could not take exercise; that his partner considered him of no account since the accident, but before he was able-bodied and did considerable work about their store; that outside of manual labor he was as good a man as before; that they were in the hardware business. *Held*, that in the absence of proof as to the value of plaintiff's business, a verdict of \$20,750 was excessive, and a new trial would be granted unless plaintiff would remit all but \$10,750 with interest.

Appeal from Second Judicial District, Deer Lodge County.

The action was tried before GALBRAITH, J.

W. W. Dixon, for Appellants.

Robinson & Stapleton, for Respondent.

BLAKE, C. J. — This action was commenced by Kennon to recover damages from Gilmer *et al.* for personal injuries sustained in 1879 through the negligence of the latter. Kennon was then

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a passenger upon the stage coach of Gilmer *et al.*, who were common carriers for hire. At the first trial in 1881 the jury returned a verdict for Kennon for the sum of \$17,167, and judgment was entered accordingly. Upon an appeal to this court it was adjudged that the cause be remanded for a new trial, but the questions which were discussed in the opinion do not arise upon this hearing. (4 Mont. 433.) At the second trial by a jury a judgment was obtained by Kennon for the sum of \$20,750. Another appeal was taken by Gilmer *et al.*, and heard by this court at the January term, 1885, when the following judgment was rendered: "The judgment is hereby reduced to the sum of \$10,750, and affirmed as to that amount." (5 Mont. 274.) Both parties sued out writs of error, and the case was remanded to this court by the Supreme Court of the United States "for further proceedings in conformity with this opinion," which is reported in 131 U. S. 22. The scope of our investigation is readily ascertained by observing the concluding paragraph of the opinion by Mr. Justice Gray: "The erroneous judgment of the Supreme Court of the Territory being reversed, the case will stand as if no such judgment had been entered, and that court will be at liberty, in disposing of the motion for a new trial according to its view of the evidence, either to deny or grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a *remittitur* by the plaintiff." The error committed by this court is clearly pointed out in this language: "The judgment of the Supreme Court of the Territory, reducing the amount of the verdict and the judgment of the inferior court thereon, without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and, so far as we are informed, unprecedented; and the grounds assigned for that judgment, in the opinion sent up with the record, as required by the rules of this court, are far from satisfactory." The legal questions relating to the admission of testimony, the assessment of damages, and the instructions to the jury, which were considered and determined by this court, were settled according to the opinion cited by Mr. Justice Gray, and are not before us for review. It is contended by the appellants that the ruling of the court

below in denying their motion for a change of venue must be again considered. It was held by Mr. Justice Gray in this case that "the granting or denial of a change of venue, like the granting or refusal of a new trial, is a matter within the discretion of the court, not ordinarily reviewable by this court on writ of error," and that "the refusal to grant a change of venue on the mere affidavit of the defendants' agent to the state of public opinion in the county clearly involves matter of fact and discretion, and is not a ruling upon a mere question of law." While it seems a needless task to pass upon the matter at this time, we deem it proper to remove all doubt, and state that we adhere to the conclusions which have been expressed in the former opinion of this court.

According to our view of the evidence, the motion for a new trial should be denied generally. Conceding that the testimony is conflicting, we must be governed by the familiar rule that prevents us, under these conditions, from disturbing the verdict. The last question for our decision is whether we should order a judgment for a less sum than the amount of the verdict. The ground of the motion for a new trial is this: "Excessive damages, appearing to have been given under the influence of passion or prejudice." The testimony concerning this point can be embodied in the following statement: Kennon testified that his age was fifty-four years when the accident occurred; that his ankle joint was dislocated; that he remained under medical attendance in Helena over two months; that his foot was amputated on account of this wound; that it was over a year before the leg healed up; that small pieces of bone came out three or four different times; that at all times he had been unable to walk without crutches; that he had an artificial foot, but usually could not wear it more than two or three hours without much pain; that his leg is very weak, although healed up; that his bill for the treatment of the leg in Helena footed up nearly \$800; that his wound was very painful until it healed; that his leg continued to pain him sometimes; that he imagined a sharp bone was trying to come out; that, after leaving Helena, he was unable to leave his house for two or three months; that there was very little business that he could attend to, and that he was deprived almost entirely by his wound of attending to any busi-

ness; that his business would be more remunerative and profitable if he could attend to it; that he was sometimes obliged to employ other help; that he was engaged in the hardware business; that his general condition of health before the accident was good, but he had not been a robust man for many years; that his health had been pretty good since the accident, but he had not been a strong man; that his general health was as good after as before the accident; that he had very little strength at the time of the trial; that he was not as strong then as he was before he was hurt; and that he could not, through his injury, take exercise. Dr. Mitchell testified that he was upon the coach at the time of the accident; that the large bone of Kennon's leg was broken, and run through the skin; that it shot out two or three inches; that the ankle joint was broken, and that the small bone was shattered; that a consultation of surgeons was held, and it was decided that immediate amputation was necessary; that he performed the operation; that the wound was slow in healing; that it was one hundred and one days before he could get the ligature away; that small pieces of bone were taken out several months after the amputation; that the leg would heal up, and then become inflamed; that the effect of amputation from inaction upon a man would be that he would not be so strong, and his powers, to that extent, would be lessened; and that a man's muscles would become soft and flexible without exercise, but as to his health, he did not know as it would have any effect. H. H. Zenor testified that he had been associated with Kennon in business for fifteen years; that he was acquainted with the general health and physical ability of Kennon prior to and since the accident; that he considered Kennon of no account since the accident; that Kennon, before this event, was an able-bodied man, and did considerable work about the store; that the business qualifications of Kennon were pretty fair; that they were in the hardware business; that he did not know if Kennon's general health had been injured, but did not think that he was as strong a man as he was before he lost his leg; that outside of the manual labor Kennon was as good a business man as he was before; that Kennon could attend to the correspondence and book-keeping; and that in the work and labor requiring strength Kennon was injured.

Gilmer *et al.* did not introduce any evidence upon this branch of the case, and we may assume that all the facts are presented in the foregoing statement. The authorities support the general proposition that no precise rule can be laid down for the award of compensation to a person who has received a permanent injury, such as the loss of a leg or an arm; that the mere fact that a verdict is returned for a larger sum than the evidence justifies, in the opinion of the court, is not a sufficient ground for judicial interference; and that the amount fixed as damages in actions of this nature will not be set aside or reduced as excessive, unless it appears to have been the result of passion or prejudice on the part of the jury. One ingredient which enters into this computation, in many cases, is the loss of income or business by reason of the injury. In *Nebraska City v. Campbell*, 2 Black, 590, the court holds that a physician can introduce evidence to prove "that he was engaged in extensive practice at the time of the injury, and also that it was a period of great sickness in the community." In *Wade v. Leroy*, 20 How. 34, the court held that evidence is competent "that before and up to and at the time of the alleged injury the particular business in which he was engaged was that of a distiller and manufacturer of turpentine, and that he was largely and extensively engaged in that business." The most remarkable illustration of this principle is contained in the English case of *Phillips v. London R. R. Co.* 42 L. T. N. S. 6, in which the jury assessed the damages in the sum of \$80,000, and a new trial was not granted.

No testimony of this character is found in the record, and the extent and value of the business in which Kennon was engaged at the time he was injured were not shown at the trial. This knowledge was necessary to enable the jury to ascertain the damages which had resulted from the injuries to the respondent. In considering cases of like kind there is no uniformity in the verdicts, and extremes can be produced upon both sides. The following number has been selected for the purpose of showing the amounts for which judgments have been sustained by appellate courts: *Illinois R. R. Co. v. Parks*, 88 Ill. 373, \$8,958; *Deppe v. C. R. I. etc. R. R. Co.* 38 Iowa, 592, \$9,000; *Ballou v. Farnum*, 11 Allen, 73, \$9,687.50; *Robinson v. Western Pacific R. R. Co.* 48 Cal. 409, \$10,000; *Belair v.*

C. & N. W. R. R. Co. 43 Iowa, 662, \$11,000; *Berg v. Chicago etc. R. R. Co.* 50 Wis. 419, \$11,000. In the absence of proof relative to the pecuniary affairs of the respondent, at the time referred to in the testimony, and following the principles which are declared in these authorities, we are compelled to say that the damages that were awarded by the jury are disproportionate to the injury complained of. At the January term, 1885, this court ordered that judgment should be entered for the sum of \$10,750, but, doubtless through inadvertence, omitted to put the same into legal form. We regard this amount fair compensation for the respondent under the law and evidence. Since that term the Supreme Court of the United States has decided generally against the appellants upon the issues which were submitted. We think that legal interest should be allowed, under the circumstances, upon this sum to the present term. It is therefore ordered and adjudged that the order of the court below, overruling the motion for a new trial herein, be reversed, and that a new trial be granted, unless the said respondent shall, within thirty days after the filing of the *remittitur* from this court in the court below, consent to release all but \$14,837.50 of such verdict; that if such consent in writing be filed as above required, then such motion shall be overruled, and said new trial shall be denied; and that the court below shall make such orders as shall become necessary to carry out the directions of this court.

BACH, J., and LIDDELL, J., concur.

MERRIGAN, RESPONDENT, v. ENGLISH ET AL.,
APPELLANTS.

MECHANIC'S LIEN—Subcontractor.—Under section 1370, fifth division, Compiled Statutes, a subcontractor has a direct lien for the reasonable value of his labor and materials.

SAME—Construction of statutes.—The repeal of section 1387 of the Compiled Statutes, providing that every contractor, subcontractor . . . having charge, in whole or in part, of the building shall be deemed the agent of the owner, did not repeal the direct lien given to subcontractors by section 1370. Section 1370 of the Compiled Statutes, giving a subcontractor a direct lien, is not unconstitutional as forfeiting the owner's property to persons with whom he never contracted.

9	113
12	345
12	528
23*	454
30*	290
31*	73
9	113
13	275
13	279
22*	454
34*	31
34*	32
9	113
16	190
17	89
9	113
18	535
9	113
41	98
9	113
40	550
40	551

PLEADING — Answer — Conclusions of law. — Where the answer does not deny any of the facts upon which plaintiff's claim for a lien is based, but denies indebtedness to plaintiff, and that plaintiff had any lien; *held*, that the denials were conclusions of law, and no issues of fact were raised by the pleadings.

HOMESTEAD — Exemption. — A homestead is subject to the lien of a mechanic for material, as well as labor, where the material is the object of the labor for which he claims his lien.

PRIORITY OF LIEN OVER MORTGAGE. — Where the work for which a lien is filed was done by a subcontractor subsequent to the filing of a mortgage, such lien takes precedence of the mortgage, and dates from the commencement of the work by the original contractor. (Following the case of *Davis v. Eilsland*, 18 Wall. 659.)

Appeal from First Judicial District, Lewis and Clarke County.

A motion for judgment on the pleadings was granted by BLAKE, C. J.

Statement of facts, prepared by the judge delivering the opinion of the court.

The plaintiff, John Merrigan, brought this action to foreclose a mechanic's lien. The complaint shows the following facts, omitting all technical matter of pleading: The defendant, Lydia J. English, was and is the owner of the premises which the plaintiff seeks to make subject to his lien, and prior to July 20, 1888, entered into a contract with the defendant Crawford, who thereby agreed to erect a building upon the premises referred to; that Crawford commenced work under said contract on the twentieth day of July, 1888, and himself entered into a contract with the plaintiff Merrigan, who thereby agreed "to do all the plastering to be done in said building, and to set a mantel therein, and to furnish the plaster and cement necessary therefor," the consideration for said contract being the sum of two hundred and seventy-eight dollars; that the said plaintiff "completed said contract, and did and performed said work and labor in the plastering of said building, and the setting of said mantel, and the furnishing of said plaster and cement, as above specified, on the twenty-seventh day of October, 1888;" that he (the plaintiff) has been paid for said work the sum of fifty-five dollars, and no more; that said work, etc., was reasonably worth the said sum of two hundred and seventy-eight dollars; that the plaintiff commenced work under his contract upon the seventh day of September, 1888, and completed said work on the twenty-seventh day of October, 1888; that the defendant, the Home Building and Loan

Association, claim a lien upon said premises, which lien, if any, is by mortgage, and is subject to the lien of the plaintiff; and that the plaintiff, on the thirty-first day of October, 1888, filed his notice of lien, setting forth in detail the facts of said filing. Then follows the prayer. The above will show all the facts material in the case, because it is not claimed that there has been a defect in pleading, the issues being sharply drawn upon the points given below, and which go directly to the plaintiff's cause of action. To this complaint a demurrer was interposed in behalf of the defendants, English and the Home Building and Loan Association. The demurrer was overruled, and each of said defendants last named filed a separate answer. The answer of the defendant English is, in effect, as follows: It denies that she is indebted to the plaintiff in any sum; denies that Crawford was her agent, or had any authority to make any contract with the plaintiff for her or in her name; denies that the account set forth in the complaint, or the lien based thereon, constitutes any lien upon the premises; denies that the plaintiff has acquired any lien upon said premises by reason of the facts set forth in the complaint; and, as affirmative defense, alleges and sets forth the contract made by her with the defendant Crawford, and that by said contract the said Crawford agreed to do and perform the work described in the complaint; and that the premises in question are, and were, at all times mentioned in the complaint, the homestead of the defendant, who is the head of a family. The answer of the defendant corporation, in addition to the matter set forth in the answer of the defendant English, pleads as a defense a bond and mortgage for the sum of one thousand dollars, which mortgage is a lien upon the premises in question, and was duly recorded in the proper office on the first day of September, 1889. The plaintiff moved for judgment upon the pleadings. The motion was granted. Judgment was entered for the plaintiff. From this judgment, and from the order overruling the demurrer, the answering defendants appealed. Many points were raised in the court below. Those considered in this court are those which are mentioned in the brief of appellants, and they are as follows: *First*, that the plaintiff is a subcontractor, and has no lien; *second*, that the premises are the homestead of the defendant English, and are therefore not subject to the lien

of the plaintiff, because they are exempt from any lien except that of a laborer or mechanic (see §§ 322, 323, subd. 1, Comp. Stats.); *third*, that the plaintiff's lien, if any, is subject to the mortgage of the defendant corporation; *fourth*, that there were certain denials in the answers which raised issues of fact.

Massena Bullard, for Appellants.

A lien being "exclusively the creature of the statute, and deriving its existence only from positive enactment," and our statute failing to provide for any lien in favor of subcontractors, it follows that the lien in this case cannot be sustained, and the demurrer to the amended complaint should have been sustained. (Phillips on Mechanics' Liens, §§ 9, 15, 18; *Chapin v. Persee*, 79 Am. Dec. note, 269, and authorities cited; Overton on Liens, §§ 552, 554; *Pike v. Irwin*, 1 Sand. 14.)

The statute of Montana does not make any provision for a subcontractor's lien: he is not mentioned in the section providing for liens. (Fifth div. Comp. Stats. § 1370.) That section 1370 applies only to persons who have contracted with the owner or proprietor, and not to subcontractors, is further evident from the fact that section 1372 of the same statute provides as follows: "It shall be the duty of every person and all persons, except as has been provided for subcontractors, who wish to avail himself or themselves of the benefit of this chapter, to file with the county recorder," etc. This is part of the old statute in force at a time when liens were provided for subcontractors. The provisions relating to subcontractors have been repealed; they are left without a lien.

By section 1387, fifth division, Compiled Statutes of Montana, the contractor was made the agent of the owner; but this section was, prior to the inception of any right of the respondent, so amended as to repeal that provision. The statute therefore does not make the contractor an agent of the owner, and no such agency exists except by statute. (Extra Session Laws of 1887, § 5, p. 72; *Deardorff v. Everhart*, 74 Mo. 37.)

It is alleged and not denied by plaintiff, that the premises which plaintiff seeks to subject to his lien constitute the homestead of the defendant. The statutes of this Territory provide

that the homestead "shall not be subject to forced sale on execution, or any other final process from a court;" and then further provide as follows: "Such exemptions shall not affect any laborer's or mechanic's lien, or extend to any mortgage thereon lawfully obtained." (First div. §§ 322, 323.) Respondent may insist that the term "mechanic's lien" in section 323 is used in its legal meaning, and that the legal meaning includes liens of material-men. We concede, that if the language of the statute was that the homestead exemption "shall not affect any mechanic's lien," and made mention of no other class of liens, then it might be with some plausibility claimed that all liens were intended to be included; but when the statute uses the terms "laborer's lien" or "mechanic's lien," it must be held to refer to the particular classes of liens named, and none other. (*Richards v. Shear*, 70 Cal. 187; *Walsh v. McMenomy*, 74 Cal. 356.)

George F. Shelton, and A. C. Botkin, for Respondent.

There is no distinction drawn between contractors and subcontractors under the Mechanic's Lien Law. There are two modes adopted by the mechanic's lien statutes of different States for securing the benefits of the statutes to subcontractors and others employed by the principal contractor. (Jones on Liens, § 1285.) The distinction between the two methods is well understood. The object of the legislature in the law of March 9, 1887, was to change, from the system of "subrogation through notice to the owner," to that of a "direct and absolute lien upon the property," in so far as it affected the rights and privileges of subcontractors. The new enactment repealed the provisions of the old law requiring notice to the owner, and section 1370 provides that every mechanic, etc., shall have a lien. This provision protects the subcontractor. (Phillips on Mechanics' Liens, § 58; *Atwood v. Williams*, 40 Me. 409; *Quale v. Moon*, 48 Cal. 478.)

The reference in section 1372 of the Lien Law to subcontractors is evidently one of those errors that creep into compilations of laws that have not been carefully revised by competent persons.

It will be observed that the authorities cited by the appellants

in their brief are from those States in which the system of "subrogation through notice to owner" prevails, and where subcontractors have no absolute lien. Mr. Jones, in his work on Liens, gives a list of the States that give, by statute, a direct and absolute lien to the subcontractor, and in that list he includes Montana, and quotes the law of March 9, 1887. (2 Jones on Liens, § 1304, n. 6; also § 1212.)

Under statutes which give to subcontractors a direct lien, the amount for which the property may be charged is not limited by the amount that may be due from the owner to the contractor, nor does it in any way depend upon the state of the account between them. (*Colter v. Frese*, 45 Ind. 96; *Merritt v. Pearson*, 58 Ind. 385; *Crawfordsville v. Johnson*, 51 Ind. 397; *Andis v. Davis*, 63 Ind. 17; *Delahay v. Goldie*, 17 Kan. 263; *Clough v. McDonald*, 18 Kan. 114; *Shellabarger v. Thayer*, 15 Kan. 619; *Atwood v. Williams*, 40 Me. 409; *Sodini v. Winter*, 32 Md. 130; *Treusch v. Shryock*, 51 Md. 162, 163; *Parker v. Bell*, 7 Gray, 429; *Laird v. Moonan*, 32 Minn. 358; *Ballou v. Black*, 21 Neb. 131; *Foster v. Dohle*, 17 Neb. 631; *Marrener v. Paxton*, 17 Neb. 634; *Lonkey v. Cook*, 15 Nev. 58; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Carson Opera House Assoc. v. Miller*, 15 Nev. 327; *White v. Miller*, 18 Pa. St. 52.)

The constitutionality of similar statutes is well established. (*Laird v. Moonan*, 32 Minn. 358; *Bohn v. McCarthy*, 29 Minn. 23; *O'Niel v. St. Olaf's School*, 26 Minn. 329; 2 Jones on Liens, § 1304.) As to the question of agency, see Phillips on Mechanics' Liens, § 79, p. 143; *Morrison v. Hancock*, 40 Mo. 564; *Dear-dorff v. Everhart*, 74 Mo. 37; *Blake v. Pitcher*, 46 Md. 454; 2 Jones on Liens, § 1306. The question of homestead cannot be successfully raised against the plaintiff, so as to defeat his lien. (*Murray v. Rapley*, 30 Ark. 568; *Edwards v. Edwards*, 24 Ohio St. 402.) The lien of respondent has priority over the mortgages of the appellant, the Home Building and Loan Association. (2 Jones on Liens, § 1480; Phillips on Mechanics' Liens, §§ 226, 228; *American Fire Ins. Co. v. Pringle*, 2 Serg. & R. 138; *Hall v. Hinckley*, 32 Wis. 362; *Davis v. Alvord*, 94 U. S. 545; *Meyer v. Delaware R. R. Co.* 100 U. S. 454; *Brooks v. Burlington & S. W. R. R. Co.* 101 U. S. 443; *Meyer v. Egbert*, 101 U. S. 728; *Batchelder v. Rand*, 117 Mass. 176.)

BACH, J.—The tendency of land-owners to enter into contracts at a figure so low that the original contractor could make no profit unless he refused to pay his employees, has led to the enactment of laws for the protection of wage earners. There are two systems generally adopted throughout the United States—one known as the New York system; the other as the Pennsylvania system. The former gives to the subcontractor a lien by way of subrogation, as it is termed by the text-writers, which is accomplished by a notice given to the owner by the subcontractor, which notice specifies the probable value of the services to be performed, or of the materials to be furnished, and the owner is thereupon entitled to withhold from the contractor money due to the latter to such an amount as will meet the demand. These are the general features of the New York system, and such was the system prevailing in this Territory prior to March, 1887, as will appear from an inspection of sections 820 to 824, inclusive, of the Revised Statutes. The other, or Pennsylvania system, gives a direct lien to the laborer or subcontractor, either by an agency created by the statute, or by an implied agency vested in the original contractor. An interesting discussion of this subject will be found in the very able opinion of the learned Chief Justice Beatty upon the petition for rehearing, in the case of *Hunter v. Truckee Lodge*, 14 Nev. 24–33, et seq. The case is one which bears directly upon all the points raised by the demurrer in this action, and especially upon the most prominent distinction between the two systems. The distinction referred to is this: Under the New York system the subcontractor cannot recover more than is due from the owner to the contractor; that is to say, he is bound by the original contract; while under the other system the original contract, or payment to the original contractor, is no defense to a claim of a subcontractor.

In order to fully understand the lien law of this Territory in force at this time, and at the time this action was commenced, we must study the law prior to the Act of March, 1887, and the effect and purpose of that act. The old law will be found in sections 820 to 848 of the Revised Statutes of 1879. Section 820 gave to “every mechanic, builder, lumberman, artisan, workman, laborer, or other person who shall do or perform any work

or labor upon, or furnish any material, machinery, or fixtures for, any building," etc., a lien "upon such building," etc., "to secure the payment of such work or labor done, or material, machinery, or fixtures furnished." Sections 821 and 822 prescribe certain rules with which a subcontractor must comply in order to avail himself of the lien given to him by section 820; and they refer more particularly to a notice which the subcontractor was required to give to the builder before performing any labor or furnishing any material, and to the manner of filing the notice of lien, and the time within which such filing must be made. Section 823 gave the owner of the building the right to withhold from the contractor sufficient money to meet such claims of subcontractors as had been duly filed; and it made the owner the surety of the contractor to that extent.

Thus it will be seen the New York system, or the system generally known as that of "equitable subrogation," was the law regulating the liens of mechanics in this Territory prior to the Act of March, 1887. Section 824 is not material to this discussion. It provided that the notices required by sections 821 and 822 might be served by the sheriff or constable. Section 825 contained the law regulating the filing of such notice of lien by any person other than a subcontractor. By the Act of March 9, 1887, section 820 was slightly amended, and as amended will be found in section 1370 of the Compiled Statutes. The amendment referred to is quite immaterial as far as this case is concerned. The same act amended section 821, and then repealed sections 821, 822, 823, and 824; which sections, it will be remembered, were those containing the regulations which applied specifically to subcontractors. Undoubtedly, it was rather inartistic to amend section 821, and then repeal it. The repeal of the old section was effected by the amendment thereof, because the amendment provided that "section 821 shall read as follows," etc., and inasmuch as section 821 was a law applying to a particular class, and 825 the rule applying generally, it would have been more logical to repeal 821 without any attempt to make it a general rule, and then so to amend section 825 that it might contain the general provision in terms agreeable to the legislative will. However, there is no difference in the result; for section 821 repealed by implication section 825

as far as that section conflicted with the new law, and the repeal to the extent indicated was accomplished by the Act of March, 1887, which in direct terms repealed all laws and parts of laws in conflict with the provisions of that act. Section 821 will be found in section 1371 of the Compiled Statutes, and section 825 will be found in section 1372 of the same volume. Returning to the law as it existed prior to the amendment of March, 1887, it will be observed that section 820 was intended to give, and did give, to every person performing work and labor, or furnishing materials, etc., a lien for the same. The words of the section are broad enough for that purpose. Sections 821 to 824 further prove it, for they provide what a subcontractor must do to "avail himself of the benefits of this chapter;" and section 845 provides that "all persons . . . shall be considered subcontractors . . . except such as have contracts with the owner." The lien, then, was given to subcontractors, as well as to contractors, by section 820, which was not materially changed by the Act of March, 1887; and that lien still exists, and is found in section 1370 of the Compiled Statutes. And the only effect of the amendment was to relieve the subcontractor of notifying the owner of his intention to furnish the material or labor for which he might thereafter claim a lien; and this change was accomplished by the express repeal of those provisions contained in sections 821 to 824, Revised Statutes, both inclusive. The only change made, therefore, by the amendments contained in the Act of March, 1887, was the rejection of the New York system, and the substitution of the Pennsylvania system, or system of direct liens in favor of subcontractors. The Act of March, 1887, contained one more provision of interest, which will be found in section 1387 of the Compiled Statutes, and by force of which "every contractor, architect, subcontractor, . . . or other person having charge of the construction, repair, or alteration, in whole or in part, of the aforesaid building, . . . shall be deemed the agent of such owner or proprietor." In the extra session of the legislature in 1887, on September 14th of that year, this power of agency was repealed, owing, no doubt, to the fact that contractors had taken advantage of the law, and had sublet contracts at absurdly high figures under this power of agency. The repeal of section 1387, however, does not repeal the lien

given by section 1370. The lien provided for is a general lien, given to all mentioned in the section. It is the same lien as was provided in section 820, which, as we have seen, included subcontractors as well as contractors; and the only change is this, that instead of a direct lien for the contract price, the subcontractor now has a direct lien for the reasonable value of his services.

We are of the opinion that the laws of this Territory do give to the subcontractor a lien. But it is urged that the law so construed is unconstitutional, more particularly so because the contractor is no longer the agent of the owner since the repeal of that section which made him the agent. There is very little difference between an agency created by a statute and an implied agency. The owner of real estate, who makes a contract with another for the erection of a building thereon, knows that the contractor cannot do, and does not contemplate doing, the work himself. He knows that others will help to perform the contract. He knows the law which gives to such workmen a lien for their services; and he therefore makes the contract with the full knowledge of the implied agency, and of his liability. He obtains the benefit of the labor, because the improvements increase the value of his land; and by exacting a proper bond from the principal contractor he can fully protect himself from double liability. We are of the opinion that the law is neither unconstitutional nor unjust. Whether or not such a law is wise, is a question for the legislature. It may be, as was urged in argument, that such a law tends to discourage building, and that it deprives the poor laborer from accepting contracts because of his inability to furnish such bonds as may be required by the land-owner; but these are matters for legislative wisdom to consider, not for judicial interpretation. Such a law has been sustained as constitutional, either directly or indirectly, in the following cases: *Parker v. Bell*, 7 Gray, 429; *Laird v. Moonan*, 32 Minn. 358; *Spofford v. True*, 33 Me. 283; *Atwood v. Williams*, 40 Me. 409; *Colter v. Frese*, 45 Ind. 96-103; *White v. Miller*, 18 Pa. St. 52, in which case Chief Justice Gibson delivered the opinion of the court.

A few extracts from the authorities will show the theory upon which such a law is sustained. "The constitutional validity of

statutes securing liens to subcontractors, and others furnishing labor or materials, irrespective of the state of the account between the owner and the contractor, is well established, and it is established upon the ground that such statutes annex the lien as an incident to the contract of the owner with the contractor; such contract being the evidence of the authority of the contractor to charge the owner's property with liabilities incurred by him in performing his contract." (2 Jones on Liens, § 1304.) "It subjects the property to the payment of debts which the owner has directly or indirectly caused or authorized in its improvement, under a knowledge that the property is so charged. In principle, it in no respect differs from the lien at common law in favor of mechanics who have bestowed labor upon the article to which it attaches. The statute provides for its existence in cases where the possession is not supposed to be in the one to be benefited by the lien." (Tenney, J., in *Spofford v. True*, 33 Me. 291, 292.) These citations and authorities dispose of another point raised by the appellants, who claim that the rights of the plaintiff are limited by the rights of the contractor. The authorities cited by the appellants are cases under the New York system, but do not apply to a law where the lien of the subcontractor is a direct lien. In addition to the authorities already cited, see *Hunter v. Truckee Lodge*, 14 Nev. 24, and more particularly in the opinion upon a petition for a rehearing, page 33.

We are now to consider the claim of the appellants that the answers raised issues of fact. The denial of indebtedness was a conclusion of law. (See *Higgins v. Germaine*, 1 Mont. 230; *Power v. Gum*, 6 Mont. 5.) The denial that the plaintiff had any lien was a conclusion of law. It was raised by the demurrer in the court below, and the legality of the lien has been sustained in this opinion. The facts upon which plaintiff bases his claim of lien were not denied. The denial that Crawford was the agent of plaintiff was not material. Such agency was not alleged in the complaint, and under our system of liens was not a necessary allegation. The complaint did allege the contract between Crawford and the defendant English; the subcontract between Crawford and the plaintiff; the performance of the subcontract by the plaintiff; the reasonable value of the services and materials furnished, which value must control (see 2 Jones

on Liens, § 1309) the non-payment of a portion of the sum thus due; and the filing of the lien. These are the facts upon which the plaintiff's lien is based, and the answer does not deny any one of them.

The next point is the claim of homestead exemption. Section 322, page 147, Compiled Statutes, contains the law exempting homesteads from forced sale "on execution or any other final process from a court." Section 323 provides that such exemption "shall not affect any laborer's or mechanic's lien." It is claimed by the appellant—*First*, that plaintiff is not a laborer or mechanic; *second*, that, even in case he is to be considered a laborer or mechanic, so much of his lien as is for materials cannot be made the subject of a lien upon a homestead. No one can doubt but that a plasterer is a laborer; and scarcely one will hesitate to admit that, in common parlance, a plasterer is a skilled laborer, and that a skilled laborer is a mechanic. Such is the common understanding of the words. The technical definition will lead to the same conclusion. Webster defines a mechanic to be "a workman or laborer other than agricultural; . . . one skilled or employed in shaping and uniting materials, as wood, metal, etc., into any kind of structure, machine, or other object, requiring the use of tools or instruments." The case of *Parker v. Bell*, 7 Gray, 429, is directly in point. The Massachusetts law gave a lien to "any person who shall actually perform labor." The plaintiffs were plasterers. The complaint so alleged, and contained the statement that in the capacity of plasterers they "actually performed labor." The learned judge says: "If these allegations are true, they [the plaintiffs] become entitled to a lien upon the house; . . . for they thus show themselves to have conformed to all the terms of the statute by force of which such a claim is to be established." In this case the complaint alleges that the plaintiff "did and performed said work and labor in plastering said building and the setting of said mantel." This allegation, being admitted, is by itself sufficient to sustain the plaintiff's claim that as a laborer he is entitled to a lien. But it is urged as the second point under this question, that the claim is in part for labor, and in part for material, and that the claim for material is not an exception to the homestead exemption. Appellants cite as conclusive authority, *Richards v.*

Shear, 70 Cal. 187, and *Walsh v. McMenemy*, 74 Cal. 356, claiming that we are bound by those cases. We think not, because it has been decided in this court that the homestead law of this Territory was not taken from California (see *Lindley v. Davis*, 7 Mont. 206), and because those cases had not been decided when the homestead law was adopted, and because they are not in point. In each of the cases cited the court treated the lien as a lien for material alone. In the case first cited the lien, as a matter of fact, was for material only. We do not hold that a material-man has such a lien as will be valid against a homestead. That is not the question before us. All that we are called upon to decide is the extent of the lien of a mechanic or laborer; and we think that the terms of section 1370 give to a laborer or mechanic a lien for the materials furnished by him, as well as for his labor, especially when the material is the object of the labor for which he claims his lien. In fact, in this case, it would be impossible to separate the value of the labor from the value of the material; for the plaster, as well as the mantel, was the result of the plaintiff's labor, the value of each was almost entirely the result of that labor, and the material composing each was comparatively valueless until it had received the impress of his labor.

The remaining point is the claim of the defendant corporation that plaintiff's lien upon the land is subsequent to the defendant's mortgage. It is admitted that the mortgage was filed after Crawford commenced work under the contract to erect the building, and before the plaintiff commenced the work for which the lien is filed. The plaintiff claims that his lien is valid as against any mortgage filed since Crawford commenced his work. This is denied by the appellant. Section 1374 provides that the liens mentioned in section 1370 "shall be prior to and have precedence over any mortgage . . . made subsequent to the commencement of work on any contract for the erection of such building." In California and other States the statutes on this subject read thus: "Subsequent to the commencement of the work." It is apparent that in such States the lien is not prior to those mortgages which are recorded prior to the commencement of the very work for which the lien is filed. But those authorities are not in point. *Davis v. Biland*, 18 Wall. 659,

is a case appealed from this court. The work upon the building was commenced May 1, 1869, the mortgage was filed on June 9, 1869, and the work for which the lien was filed was commenced in July, 1869. It was held that the lien dated from May 1st, the date of the commencement of the building, and was prior to the mortgage. The statute in force at that time differs slightly from section 1374 above quoted. The former reads thus: "Subsequent to the commencement of said building." But there is no difference in the meaning. When Crawford commenced to erect the building, work was commenced on a contract for the erection of the building; in other words, that was "the commencement of the building." Such a construction of the statute as is stated in the case last cited is not unjust. The mortgagee knew the law. He knew, or could have known, that work had been commenced on a contract for the erection of a building. He knew that persons other than the original contractor would perform work and labor which would improve the property upon which, as security, he advanced the money. He knew of the lien which such subcontractor could acquire. To hold otherwise would be to destroy the very purpose of this law, which was to give to the subcontractor a direct lien for the value of his labor; because it is evident, if the contrary was held, such liens would be made worse than a farce by so-called blanket mortgages filed the day after the improvement was commenced.

We find no error in the record. The judgment is affirmed with costs.

DE WOLFE, J., and LIDDELL, J., concur.

MADDOX, RESPONDENT, v. RADER ET AL., APPELLANTS.
WILLIAM GADDIS, INTERVENOR.

SHERIFF—*Liability of sureties—Chattel mortgage.*—Money received by a sheriff from a sale of chattels under a mortgage containing a clause, authorized by statute, empowering the sheriff of the county to execute the power of sale therein granted, is received by him in his official capacity, and a failure to pay over such money is a breach of official duty for which his bondsmen are liable. (Case of *Vose v. Whitney*, 7 Mont. 393, approved.)

9	126
16	334
9	126
18	519
18	523
18	594

SAME — Sheriff's bonds — Official duty — Action on bond. — Section 850, fifth division, Compiled Statutes, prescribing, in substance, the conditions of a sheriff's bond, recites among other conditions that he "shall pay over all moneys that may come into his hands as sheriff." In this case the bond omitted such clause, but provided for the "well and faithful performance of all official duties now required of him by law." In an action on the bond for his failure to pay over money received from a sale of property under a chattel mortgage. *Held*, that as the sale of the mortgaged chattels was an official duty, the obligation to pay the money over was clearly within the conditions undertaken by his sureties.

ATTORNEYS AT LAW — Power at sheriff's sale. — An attorney at law representing the mortgagees at a sheriff's sale has no implied power to authorize the sheriff to accept credit bids. (LIDDELL, J., dissenting.)

RATIFICATION — Foreclosure sale. — Where a sheriff at a chattel mortgage sale sold some of the property for cash and some on credit, without authority, paying to the mortgagees the money received from the cash sales, the acceptance thereof is not a ratification of the credit sales where no conditions were attached to the payment.

PRIORITY IN ACTION ON OFFICIAL BOND — Intervention. — Where a chattel mortgage on the same property is given to secure two notes to different holders, due at the same time, and an action was commenced upon the sheriff's bond by one of the mortgagees for official misconduct at the foreclosure sale; *held*, that the mere commencement of the action did not give such mortgagee priority in exhausting the penalty of the bond, and that the other mortgagee was properly allowed to intervene.

INTEREST — Official bonds. — In an action on an official bond, where a demand has been made for money due, and payment refused, the sureties are liable for legal interest from the date of such demand, even though the principal with such interest added exceeds the penalty of the bond. (*Jefferson County v. Lineberger*, 3 Mont. 231, approved. LIDDELL, J., dissenting.)

Appeal from Fourth Judicial District, Meagher County.

On the trial of this action defendants admitted the material allegations of the complaint and voluntarily assumed the burden of proof. The testimony of defendants was excluded on motion, and judgment was rendered for plaintiffs by BACH, J.

Max Waterman, Sanders, Cullen & Sanders, and H. G. McIntyre, for Appellants.

The provision of the bond under which the sheriff's bondsmen must be made liable, if at all, reads as follows: "If the said William Rader shall well, truly, and faithfully perform all official duties now required of him by law, and shall truly and faithfully execute and perform all the duties of such office of sheriff required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void, etc." It is under the first clause of this condition that by the judgment of the court below these sureties are held liable, and yet there

is not a syllable in the statute conferring the right on the sheriff to execute the power of sale contained in a chattel mortgage, which requires him to pay over to the mortgagees the moneys received at such sale. The sureties are entitled to stand upon the very letter of their bond. Their liability is *strictissimi juris*, and cannot be extended beyond the scope of their engagements. (*Miller v. Stewart*, 9 Wheat. 702; *United States v. Boyd*, 15 Peters, 207; *Leggett v. Humphreys*, 21 How. 75; *People v. Pennock*, 60 N. Y. 421; *Carey v. State*, 34 Ind. 105; *Scott v. State*, 46 Ind. 204; *Jenkins v. Lemonds*, 29 Ind. 294; *State v. Givan*, 45 Ind. 267; *People v. Moon*, 3 Scam. 123; *Nolley v. Callaway Co.* 11 Mo. 447; *City of St. Louis v. Sickles*, 52 Mo. 122, 129; *Carpenter v. Sloane*, 20 Ohio, 328; *Webb v. Anspach*, 3 Ohio St. 526; *Henderson v. Coover*, 4 Nev. 430; *Cressey v. Gierman*, 7 Minn. 398; *Schloss v. White*, 16 Cal. 66.)

If the bond in suit was conditioned as is required by section 850, fifth division of the Compiled Statutes, prescribing the form of a sheriff's bond, it might be that the sureties would be liable for money received on a foreclosure sale under a chattel mortgage, and not paid over by the sheriff to the mortgagee. A provision of the prescribed statutory bond is that he "shall pay over all moneys that may come into his hands as sheriff." There is no such provision in the bond in this case. There is no cause of action against the sureties unless their liability be extended by implication.

The statute (§ 1550, fifth div. Comp. Stats.), after providing that the mortgagor may insert in his mortgage a clause authorizing the sheriff to execute the power of sale therein contained, further provides, that "the sheriff of such county, at the time of such sale, may advertise and sell the mortgaged property in the manner provided in such mortgage." There is nothing said concerning the proceeds of such sale, or what application is to be made of them. In *Vose v. Whitney*, 7 Mont. 385-394, it is held that in making the sale the sheriff performs an official duty, and the court says: "Inasmuch as he acted under the requirements of law, he must have been held to have been performing an official duty." As we have already seen, there is no "requirement of law" prescribing how the proceeds of such sale shall be applied, and therefore it must be that in this respect

the sheriff acts as agent. In that case the sureties are not liable. (Herman on Chattel Mortgages, § 216.)

The pleadings and testimony show that the forfeit money paid to the sheriff by Kier under the agreement consented to by attorney Smith was received by the mortgagees, who now propose to repudiate the agreement, without restoring, or offering to restore, what they thus confess to have obtained under it. A principal cannot ratify so much of an agent's contract as results to his benefit, and disaffirm the remainder. (*Drennan v. Walker*, 21 Ark. 539; *Seago v. Martin*, 6 Heisk. 308; *Fort v. Coker*, 11 Heisk. 579; *Newall v. Hurlbut*, 2 Vt. 351; *Burgess v. Harris*, 47 Vt. 322; *Benedict v. Smith*, 10 Paige, 128; *Farmers' L. & T. Co. v. Walworth*, 1 N. Y. 433; *Crans v. Hunter*, 28 N. Y. 389; *Elwell v. Chamberlin*, 31 N. Y. 611; *Fowler v. N. Y. Gold Exch.* 67 N. Y. 138; *Corning v. Southland*, 3 Hill, 552; *Moss v. Rossie L. M. Co.* 5 Hill, 137; *Widner v. Lane*, 14 Mich. 124; *Henderson v. Cummings*, 44 Ill. 325; *Cochran v. Chitwood*, 59 Ill. 53; *Krider v. Western College*, 31 Iowa, 547; *Beidman v. Goodell*, 56 Iowa, 592; *Roberts v. Rumler*, 58 Iowa, 301; *Warder v. Pattee*, 57 Iowa, 515; *South. Ex. Co. v. Palmer*, 48 Ga. 85; *Hunter v. Stembridge*, 17 Ga. 243; *Hardeman v. Ford*, 12 Ga. 205; *Menkens v. Watson*, 27 Mo. 163; *Joslin v. Miller*, 14 Neb. 91; *New England M. I. Co. v. De Wolf*, 8 Pick. 63; *Culver v. Ashley*, 19 Pick. 300; *Hovey v. Blanchard*, 13 N. H. 145; *Tasker v. Kenton Ins. Co.* 59 N. H. 438; *Strasser v. Conklin*, 54 Wis. 102; *Babcock v. Deford*, 14 Kan. 408; *Coleman v. Stark*, 1 Or. 115; *Rudasill v. Falls*, 92 N. C. 222.)

Wade, Toole & Wallace, for Respondent, Maddox.

The law on the subject of mortgaged chattels (§§ 1550, 1551, p. 1072, Comp. Stats.) provides, that it shall be lawful for the mortgagor of goods, chattels, and personal property to insert in his mortgage a clause authorizing the sheriff to execute the power of sale therein granted to the mortgagee; in which case the sheriff, at the time of such sale, may advertise and sell the mortgaged property in the manner provided in the mortgage. This mortgage provided in detail for the disposition of the proceeds arising from the sale of the property, by the application thereof to the

payment of the mortgage debts, etc. The word "sale," unless otherwise limited, always implies payment in cash (see Murfree on Sheriffs, § 993), and unless an agent have express authority to sell on credit, his authority is always limited to a cash sale. (*State of Illinois v. Delafield*, 8 Paige, 527; Ewell's Evans on Agency, p. 164.)

A sale under the provisions of section 1550, which confers the authority and imposes the duty upon the sheriff as an officer, is expressly distinguished from the "power of sale granted to the mortgagee," and that power of sale granted to the mortgagee, and also imposed as a duty upon the sheriff, is the power to sell and apply the proceeds to effectuate a satisfaction of the mortgage. The sheriff, with relation to the chattel mortgage, sells, and in the performance of whatever duties the law enjoins upon him with reference thereto, acts in an official capacity. (*Vose v. Whitney*, 7 Mont. 385, et seq.) The authorities cited by appellants are all cases where the moneys never were received by the officer in an official capacity, and that therefore the bondsmen of the officer could not be held liable for their misappropriation.

Where moneys are received by a sheriff or other officer by virtue of his office, a trust as to their disposition attaches upon their receipt; and the disposition of these moneys in accordance with this necessary trust is one of the primary duties and responsibilities of the officer. (*State v. Rhoades*, 7 Nev. 439; *State v. Watson*, 38 Ark. 96; *Maguire v. Bry*, 3 Rob. [La.] 196.)

The record nowhere discloses an express agreement on the part of attorney Smith to any credit sale. Such an agreement, if any had been made, without ratification, would be an absolute nullity and void as beyond the general power of an attorney, under which solely, it is conceded, was Smith in this instance acting. (Freeman on Judgments, § 463, p. 487; *Portis v. Ennis*, 27 Tex. 574; *Card v. Wallbridge*, 18 Ohio, 411; *Bigler v. Toy*, 86 Iowa, 687; *Dickerson v. Hodges*, 43 N. J. Eq. 45; *Insley v. Disharoon*, Md. June, 1886, 5 Atl. Rep. 468; *Wilson v. Jennings*, 3 Ohio St. 528, 539; 2 Greenleaf on Evidence, p. 123; *Savery v. Sypher*, 6 Wall. 159; *Carter v. Talcott*, 10 Vt. 471; *Stackhouse v. O'Hara*, Err. 14 Pa. St. 88; *Nolan v. Jackson*, 16 Ill. 272; *Wilson v. Wadleigh*, 36 Me. 496; *Wright v. Daily*, 26 Tex. 730; *Drain v. Doggett*, 41 Iowa, 684; *Lewis*

v. *Gamage*, 1 Pick. 347; *Campbell v. Bagley*, 19 La. An. 172.) The only claim of ratification contended for by appellants is by virtue of the receipt of so much of the cash as the sheriff was able at the time to turn over. No presumptive ratification can arise unless the act and conduct of the principal be inconsistent with any other supposition. (1 Wait's Actions and Defenses, p. 234.)

Upon the point that the judgment against the sureties is greater than the penalty of the bond, it is enough to say that the excess consists simply of legal interest upon the penalty named in the bond, from the period when it is admitted that a demand was made upon the bondsmen to pay the claim. (2 Sutherland on Damages, p. 15, n. 1.)

As this is an action for the independent tort of the sheriff in failing to pay the Maddox note, Gaddis has no interest in the subject-matter of Maddox's suit so as to enable him to intervene. (2 Deering's Code, p. 120, n.; 3 Sutherland on Damages, p. 211; *Governor v. Hicks*, 12 Ga. 190; *Rhoads v. Booth*, 14 Iowa, 576.)

Carpenter, Buck, & Hunt, for Respondent, Gaddis, in support of the right to intervene, cited: Comp. Stats. Mont. first div. § 24; Gen. Laws of Cal. § 5587; Pomeroy on Remedies, § 426, et seq.; Jones on Chattel Mortgages, § 49; *Tyler v. Taylor*, 8 Barb. 587; *Nowlen v. Colt*, 6 Hill, 461; *Page v. Pierce*, 26 N. H. 317; *May v. May*, 1 Car. & P. 44; *Noyes v. Barnet*, 57 N. H. 605.

BLAKE, C. J.—This action was commenced by the respondent Maddox, to recover from the appellants, the sheriff of Meagher County and the sureties upon his official bond, the sum of \$5,314.69 and interest. Gaddis was allowed to intervene by the order of the court below, and demanded judgment against the appellants for the sum of \$5,000. It appears from the transcript that the appellants voluntarily assumed the "burden of proof, and admitted all the material allegations of the complaint" of Maddox and Gaddis. The following statement of the facts, which are contained in the pleadings, defines clearly the nature of the present inquiry: William Rader was the sheriff of Meagher County in 1887, and the other appellants

executed, in 1886, his official bond in the sum of \$5,000. The condition is that Rader "shall well, truly, and faithfully perform all official duties now required of him by law, and shall truly and faithfully execute and perform all the duties of such office of sheriff required by law to be executed subsequently to the execution of this bond." Maddox placed in the hands of Rader, August 9, 1887, a chattel mortgage dated July 9, 1886, and executed by P. D. Kinyon, to secure the payment to Maddox of the sum of \$7,313 in one year, with interest, and to Gaddis of the sum of \$3,000 in one year, with interest. The property consisted of horses, and the sheriff was directed to take them into his possession and sell the same, and apply the proceeds according to the terms of such mortgage. The officer, between the ninth and thirtieth days of August, 1887, took possession of the property, and advertised it for sale at public auction, and between the thirtieth day of August and the fifth day of September, 1887, sold a large portion thereof for the sum of \$10,735. On the last-named date the sheriff released and returned the remainder of the horses then unsold to Kinyon upon the payment of a sum of money, which was sufficient, when added to the amount of said sales, to satisfy the notes of Maddox and Gaddis, which are set forth in the mortgage, and all costs and disbursements arising from the sale. There was due to Maddox, September 5, 1887, the sum of \$8,137, and the sheriff paid to him, September 15, 1887, the sum of \$2,872.31. Maddox demanded of the sheriff, September 17, 1887, the amount remaining due, \$5,314.69, which has not been paid. Copies of the mortgage and bond are made parts of the complaint. The allegations in the pleading of Gaddis show similar facts, so far as the proceedings affect the sheriff. Rader, in his answer, denies that he received any other sum than \$4,390.65 at the sale, and alleges that 142 horses were "bid off and knocked down" to A. B. Kier for the price of \$8,096.50, in pursuance of an agreement between Maddox and Gaddis and Kier. That Kier paid thereon the sum of \$1,752.15, which is included in said amount of \$4,390.65, "and was to have the period of five days in which to pay the balance of said sum of \$8,096.50; the said Rader to keep and retain the said horses, mares, and colts until the full payment of said sum of \$8,096.50, and in the

event of Kier's failure to fully pay said sum, the said \$1,752.15 to become forfeited to the use of the said mortgagees, and said horses, mares, and colts to be retained by said Rader for and on account of said mortgagees; and, subject to their orders, the said William Rader retained said sum of \$1,752.15, and paid the same over to said mortgagees, it being, as aforesaid, a part of said sum of \$4,390.65, and retained in his custody said 142 horses, mares, and colts, subject to the order of the said mortgagees. That afterwards, to wit, on the ——— day of September, A. D. 1887, the said Rader notified the said mortgagees of Kier's failure to pay the balance of said sum of \$8,096.50, and notified them that said horses, mares, and colts were then and there held by him subject to their orders; and afterwards, to wit, on the ——— day of September, 1887, on said mortgagees failing to direct what disposition he should make of the same, the said Rader tendered said horses, mares, and colts to said mortgagees, which they then and there refused to receive; and that said Rader, ever since the last-mentioned date, has had, and now has, said horses, mares, and colts in his possession, subject to the order and disposal of said mortgagees. That on, to wit, the fifth day of September, A. D. 1887, P. D. Kinyon, the mortgagor in said mortgage mentioned, tendered and paid to said Rader the sum of \$2,459.20, that being the balance due on said mortgage at that time, and demanded the return to him of the property then unsold, which was then held by the said Rader; and that thereupon the said Rader returned to the said Kinyon such unsold property, and paid over to the said mortgagees the said sum of \$2,459.20. That the total money so as aforesaid by said Rader received was the sum of \$6,849.85. That the costs, disbursements, and expenses in and about said mortgage sale were the sum of \$1,445.35, which were paid off and discharged by said Rader; and that said Rader, for and on account of said chattel mortgage, has paid to Fletcher Maddox, mortgagee, the sum of \$3,192.93, and to William Gaddis, mortgagee, the sum of \$1,591.57. That the foregoing constitute the acts and facts complained of by plaintiff herein." The same answer was filed to the complaint of Gaddis. The replications deny that any agreement was entered into with Kier or the sheriff, through the instructions of the mortgagees, which con-

trolled the sale or disposition of the property. The testimony which was introduced at the trial on behalf of the sheriff and his sureties was excluded, and judgment was rendered by the court for Maddox and Gaddis.

The laws of the Territory provide that "it shall be lawful for the mortgagor of goods, chattels, or personal property to insert in his mortgage a clause authorizing the sheriff of the county in which such property, or any part thereof, may be, to execute the power of sale therein granted to the mortgagee, his legal representative and assigns, in which case the sheriff of such county, at the time of such sale, may advertise and sell the mortgaged property in the manner provided in such mortgage. (Comp. Stats. div. 5, § 1550.) The next section is as follows: "The sheriff making a sale of mortgaged property, as in the foregoing section provided, shall be entitled to receive as his compensation the same fees as upon sales of personal property on execution." (Comp. Stats. div. 5, § 1551.) The chapter governing sheriffs prescribes that "the condition of such bond shall be, in substance, as follows: That if the said _____ shall well and faithfully perform and execute the duties of the office of sheriff of said county of _____ during the continuance in office by virtue of said election, without fraud, deceit, or oppression, and shall pay over all moneys that may come into his hands as sheriff, and shall deliver to his successor all writs, papers, and other things pertaining to his office, which may be so required by law." (Comp. Stats. div. 5, § 850.) It will be observed that the language of the bond of Rader does not follow the words of the statute. The appellants contend, and it is conceded, that the liability of the sureties cannot be extended by implication, and that they are entitled to stand upon the terms of their written contract. It is further claimed that the omission of a condition respecting the paying over of moneys that may come into the hands of the sheriff, and the failure of the act relating to chattel mortgages to provide therefor, relieve the sureties from all responsibility in this action. Rader accepted the trust that was tendered to him by the mortgagees, and, by virtue of the statute and instrument conferring the authority upon him, took possession of the property, and admits that he received certain sums of money from the sales which have been

mentioned. We are of the opinion that this court, in *Vose v. Whitney*, 7 Mont. 393, decided some of these questions, and Mr. Justice McLeary, in construing this law, says: "Under this statute the sheriff took possession of these cattle in his official capacity, and not solely as the agent of either the mortgagee or the mortgagor. He is an executive officer appointed by the law to make the sale of the mortgaged property in compliance with the terms of the mortgage itself. . . . But inasmuch as he acted under the requirements of the law, he must be held to have been performing an official duty." Let us then gather from the terms of the mortgage the obligations that were voluntarily assumed by Rader at the request of the mortgagees. This instrument empowers the sheriff to sell the property "in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, together with an attorney's commission of five per cent; and the overplus, if any there be, shall be paid by the party making such sale, on demand," to Kinyon. It is a presumption of law that the bond of Rader was executed in contemplation of the statute defining the duties of the sheriff in making sales authorized by chattel mortgages. (*Territory v. Carson*, 7 Mont. 425.) The obligation to account for and pay over money which may have been received by the officer in the discharge of his public trust is clearly included within the performance of the conditions that were undertaken by the sureties. It was the duty of Rader to comply faithfully with the provisions of the mortgage concerning the payment of the money which he obtained from the sale of the property of Kinyon. This action has been properly commenced against the principal and his sureties, who executed the bond that Rader would perform "all official duties."

Does the evidence tend to prove that the foregoing agreements were made at the time of the sale by the officer, between Kier and the mortgagees? Maddox and Gaddis were not present, and N. B. Smith, Esq., acted and was consulted as their attorney. The appellants insist that Rader accepted the bids of Kier under the contract which was entered into by Smith in behalf of the respondents. A material admission appears in the transcript as follows: "And the counsel for defendant, in open court, stated

that they had no proof to offer, and did not expect to prove any kind or character of special authority in N. B. Smith, and relied solely upon his general authority by virtue of the mortgage having been placed in his hands for foreclosure." The authorities are harmonious in supporting the proposition that an attorney at law has no right to receive anything except money in payment of a debt which has been intrusted to him for collection, without express direction from his client. (2 Greenleaf on Evidence, § 141, and cases cited; *Stackhouse v. O'Hara*, 14 Pa. St. 88; *Harper v. Harvey*, 4 W. Va. 539; *Smock v. Dade*, 5 Rand. 639; *Jeter v. Haviland*, 24 Ga. 252; *Miller v. Edmonston*, 8 Blackf. 291; *Trumbull v. Nicholson*, 27 Ill. 149; *Campbell v. Bagley*, 19 La. An. 172; *Wright v. Daily*, 26 Tex. 730; *Nolan v. Jackson*, 16 Ill. 272.) The respondents did not empower Smith to sell the mortgaged property to any bidder on credit, and are not bound by the action of the sheriff in the arrangements with Kier.

Rader retains, subject to the action of the mortgagees, the horses which were "knocked down" to Kier; and, having treated the bids of Kier as cash, accepted from the mortgagor the sum of \$2,459.20 in full satisfaction of the mortgage, and delivered to Kinyon the property remaining unsold. It is not pretended that these acts of the officer were authorized by the respondents, or their attorney, but the appellants say that they have been ratified by the receipt of the amounts arising from the transactions, which are referred to in the answer. The mortgagees demanded from Rader the payment of the principal and interest of the promissory notes made by Kinyon, and refused to take property in lieu thereof. They accepted from the sheriff the sums of money which have been specified in partial satisfaction of their claim against the mortgagor. No conditions were annexed to these payments by Rader, and no fact is pleaded or shown which can be deemed a ratification of his conduct by the respondents.

By a stipulation of the parties, the court heard upon this appeal the arguments of Maddox and Gaddis upon the right of the latter to intervene in the action. They are interested as mortgagees, and hold separate promissory notes, which are payable by Kinyon at the same time, and secured by the same prop-

erty, and no priority is recognized in the mortgage. Mr. Jones, in his treatise on Chattel Mortgages, says: "Where a mortgage has been given to secure two notes to different holders, and the mortgagees seek to reduce the property to possession by replevin under a clause giving them this right whenever they should feel themselves insecure, they must sue jointly, as they are joint owners." (§ 49, and cases cited; *Noyes v. Barnet*, 57 N. H. 605.) But while the counsel for Maddox admit that Gaddis could intervene in an action for the foreclosure of this mortgage, they assert that this suit is founded on the official misconduct of Rader, and that their client is the first party who is entitled to exhaust the penalty of the bond. The twenty-fourth section of the Code of Civil Procedure is applicable to this branch of the controversy: "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter of litigation in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, . . . or by demanding anything adversely to both the plaintiff and defendant, and is made by complaint setting forth the grounds upon which the intervention rests, filed by leave of the court. . . ." Mr. Pomeroy reviews the authorities upon the subject, and concludes: "The intervenor's interest must be such that, if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought." (Pomeroy on Remedies, § 430.) If the sheriff had performed his duty, and sold the property of Kinyon for cash, the respondents would have been jointly interested in the proceeds. But under the circumstances attending the case, their sole remedy is against the appellants, and in the absence of an agreement of the mortgagor and mortgagees, or a statute providing therefor, we do not think that the mere commencement of the action by Maddox secured a prior lien upon the bond of Rader. The court below committed no error in allowing Gaddis to intervene and file his complaint under the provisions of the Code of Civil Procedure, *supra*.

Legal interest was computed upon the penalty of the bond of the sheriff from the time the demand was made for the payment of the money which was found to be due to the respondents, and the appellants remark, in passing, that this action is erroneous. The case of *Jefferson County v. Lineberger*, 3 Mont. 246, was brought upon the official bond of a county treasurer to recover a certain amount. This court held that it was the duty of the principal and his sureties to pay the sum for which this officer was liable when he was in default; and that, upon their failure and refusal so to do, the county could institute an action, and collect interest under the laws of the Territory. (Comp. Stats. div. 5, § 1237.) The amount of the penalty in the bond sued on does not limit the responsibility of the sureties in this action. (2 Sutherland on Damages, 15, n., and cases cited.) It is therefore ordered and adjudged that the judgment be affirmed, with costs.

DE WOLFE, J., concurs.

LIDDELL, J. (*dissenting*). The following undisputed facts appear in this case: P. D. Kinyon borrowed \$10,313 from William Gaddis and Fletcher Maddox, for which he gave two notes on the 9th of July, 1886—one to Gaddis for \$3,000, and another to Maddox for \$7,313—and on the same day executed a chattel mortgage on a herd of horses, to secure the payment of the notes, and stipulated therein that upon default in the payment the sheriff was empowered to take possession and sell the mortgaged property after five days' advertisement, either at private or public sale, and apply the proceeds to the payment of the mortgaged debt. Default having been made, the two creditors placed the mortgage in the hands of their attorney, who delivered it to the sheriff, William Rader, with the following indorsement thereon: "To the sheriff of Meagher County, Montana Territory: You are hereby authorized to execute the power of sale contained in certain chattel mortgage, of which within is a true copy. Fletcher Maddox and William Gaddis, by N. B. Smith, their agent and attorney." Under this order the sheriff took possession of several hundred head of horses, and advertised them for sale on the 30th of August, 1887. At

this sale, which was attended by the creditors' attorney, a man by the name of Kier bid off about \$1,100 worth of horses, when the sheriff refused to cry his bids any longer. Kier replied that he wished to purchase to the extent of several thousand dollars; that he had \$2,000 in bank which he would place in the hands of the sheriff, and also leave any stock which he might purchase in the sheriff's possession until he should pay the balance of the purchase money, which he could readily do in five days. If he failed to comply with his bid the money and horses should be forfeited to the mortgagees. The sheriff referred the matter to the mortgagees' attorney, who, after some discussion, directed the sheriff to proceed with the sale, which was accordingly done. On that occasion Kier continued his bids, and on the day following he was represented by his attorney, one Waterman, who, under a written power from Kier, bid off \$1,600 worth of horses for him, making his bid reach about \$8,096.50. On inquiry at the bank it was found that Kier did not have more than \$1,752, but this was turned over to the sheriff on the second day of the sale, which lasted for five days. Mr. Waterman's bids were on the fifth day, and before they were received by the sheriff he displayed his written power, and again the matter was referred to the creditors' attorney, who, upon being shown that the amount of money already in the sheriff's hands was sufficient to cover any loss and expenses from a resale of the property, said to the sheriff: "It is all right, and you can go ahead with the sale;" and thereupon Waterman made the purchases referred to. Kier's purchases in the aggregate amounted to \$8,096.50, and thereafter, the mortgagor having paid the difference between the bids of Kier and the debt and costs, the sheriff released the rest of the mortgaged property. The horses purchased by Kier (142 in number) with the \$1,752, remained in the sheriff's hands. Kier failed to comply with his bid, and the sheriff, after paying costs and attorney's fees, apportioned the money in hand between the two creditors; that is, \$3,192.93 to Maddox, and \$1,591.57 to Gaddis; and also tendered the horses, 142 head, to the mortgagees, who received the money but refused to take the horses, and failed to direct what disposition was to be made of them. Subsequently the sheriff sold 23 head of horses at private sale

for \$1.275, from which he deducted costs of herding, breeding, and keeping the same, and tenders the balance, with the horses, if plaintiffs will accept.

Upon this state of facts Maddox instituted suit against the sheriff and his bondsmen, alleging that the sheriff had sold the property for enough to satisfy all claims, and that, after demand, he had failed to pay over the same; wherefore he prayed for a judgment solidarily against both the sheriff and his bondsmen for the balance due him, to wit, \$5,314.69, with interest. As the sheriff's official bond is only for \$5,000, Gaddis intervened in this suit, and prayed for a like judgment up to the amount due him, to wit, \$1,927.18, and that the sum due and recovered on the official bond might be apportioned between the two mortgagees. The sheriff and his bondsmen, in whose custody he placed the horses after the refusal of the plaintiff either to accept or direct what disposition should be made of them, answered, setting up all of the foregoing facts, and again tendering the horses, and setting forth the sale by the sheriff of some 23 head at \$1,275, which they also tendered, less the cost of herding, breeding, and keeping, if the creditors will accept. They further aver that the horses are subject to the order and disposal of the creditors.

The demurrer of defendant to the complaints of plaintiff and intervenor is not well taken. Each states a cause of action, and I entertain no doubt of the liability of the sheriff and his bondsmen for any failure to perform his duties. As the sheriff of the county he could not have refused to execute the power of sale at the request of the creditors; and if he neglected to perform the duties incumbent upon him as sheriff, his bondsmen must respond for any damage sustained by either his misfeasance or malfeasance in office, and therefore I think the judge *a quo* correctly overruled the demurrer.

This is a suit against the sheriff for damages in failing to pay over funds; and when Gaddis filed his intervention the plaintiff moved to dismiss the same by striking it from the files, as not stating a cause of action; but the judge *a quo* overruled the same, and upon final trial he gave judgment for the full sum prayed for, and distributing the amount between the plaintiff and intervenor. There is a bill of exceptions to this ruling

taken by the plaintiff, but there is no notice of appeal or bond on his part, and consequently we cannot consider the issues between them. Neither plaintiff nor intervenor have appealed from the judgment or order, and therefore they are respondents, while the defendants, who are appellants, are not concerned; nor do they complain of the *status* of the case as between the plaintiff and intervenor. As between co-respondents or appellees there can be no change in a judgment. To have this court review an order or final judgment as between intervenor and plaintiff the matter complained of must be brought before us by an appeal of one or the other. I therefore think the questions raised by the motion to dismiss the intervention cannot be heard in this court.

The facts which I have detailed in support of this opinion were all elicited from witnesses upon the trial of this case. They were incontestably established by the defense, and no effort was made to rebut them; but upon motion all the testimony and evidence upon the part of the defendants was stricken from the record, and straightway a judgment was entered against the sheriff and his bondsmen *in solido*, and for an amount in excess of the sum for which the sureties had bound themselves. So far as the seizing creditor is concerned, the sheriff is the creature of instructions; and when he had received his authority from the mortgagees, either personally or through their agent or attorney, he was to obey all instructions concerning the execution of the writs from them or their attorney, and which did not conflict with the rights of the defendant. I assimilate the proceedings to sell the mortgaged property through the sheriff to sales by auctioneers. It is too clear to admit of discussion that the power of a sheriff to sell does not empower him to either sell on credit or upon conditions or contingencies; and it is equally beyond discussion that an attorney at law must have express authority to create a debt or buy property. But as the sheriff, in making the sale, is under the control of the creditors, or their attorney present, I have no doubt but that it was the sheriff's place to receive and cry the bids of Kier when so instructed by the creditors' attorney; and in view of his employment and profession I do not think that he required any express authority to direct the sheriff to cry what he considered a good bid. The record does

not show that there were any other bidders at the sale than Kier; and I conclude from the circumstances that the attorney for the creditors thought that it was advantageous to his clients to allow Kier to bid, for the horses still remained in the hands of the sheriff, and the \$1,752 deposited with him was considered by the attorney as sufficient to cover the expenses and damages resulting from a resale in case Kier did not comply with his bid, or his clients declined to take the horses. The sheriff is not the guarantor of any one who bids at a sale made by him. If the purchaser declines or fails to comply with his bid, although perfectly solvent, the creditor may have the property resold, and demand the difference from the purchaser, or he may continue the sale of the debtor's property. So we may leave out of view any question of authority to receive the bids made by Kier. The case was one where the purchaser had either neglected or refused to comply with his bid by paying the purchase price. The property was not his until he complied with the terms of the bid, and until he did so it remained the property of the mortgagor. It was not the property of the sheriff, nor did it become that of the creditors, because they had repudiated the agreement of their attorney.

It became the duty of the sheriff, acting as the auctioneer of the plaintiffs, to notify them of the refusal of the purchaser to comply with his bid, and when he did so, and the mortgagees refused to ratify the acts of their attorney by taking the property as their own, they should have directed the sheriff to resell it, and if it had failed to bring the original purchase price, or enough to satisfy the mortgages, they might continue to sell the mortgaged property. It is obvious that they have been in fault in this respect. The horses bid off by Kier do not belong either to them or to the sheriff, but to the mortgage debtor. And the failure of Kier did not obligate the sheriff in any way to pay his bid, any more than it would be obligatory on the sheriff to pay the bids of a purchaser at a sheriff's sale under execution. In this respect there is no fraud charged against the sheriff either by the plaintiff or intervenor. If any one is to blame it is the attorney of the creditors, who, by his repeated directions to the sheriff to proceed with the sale, held himself out as properly empowered by his clients to act in this matter. His clients

might very well decline to become the purchasers of the horses upon the failure of Kier to pay for them, but they cannot escape from the act of their attorney in directing the sheriff to receive Kier's bids. When they did so they should have directed the sheriff to resell the property. The fact that the sheriff released the other mortgaged property after the payment of the difference between Kier's purchase and the amount due, did not have the effect of extinguishing the mortgage or Kinyon's liability. It is the latter's obligation to pay the debt, and if the property in the sheriff's hands is not sufficient, upon a resale of the same, the mortgaged property must pay the balance, and, in default, Kinyon personally. It is not true that Kier paid the \$1,752 to the sheriff to cover the amount of his first bid, but the evidence is precise and explicit that he paid the sum after his conversations and understanding with the plaintiff's attorney, present at the sale, to cover any damage and expense which might be occasioned should he fail to pay the rest of his bid within five days.

The case of the plaintiff was completely destroyed by the defendant's evidence at the time of the filing of the motion to strike out. The plaintiff sued the sheriff for failure to pay over proceeds arising from the sale, while the evidence shows that all the money received from the sale had been paid over, and that the purchaser, Kier, had never complied with his bid, but that the property was still in the sheriff's hands. The intervenor's case should also fail because of the same facts, and the additional fact of the defendant's tender of the property which it is claimed that the sheriff has converted. After their attorney had refused emphatically to receive the horses, but demanded the cash, it was a vain and useless thing for the sheriff to continue his tender of the property. Tender is only a protection to one who owes a debt; and what the sheriff terms a "tender" was merely a notice that the property was in his hands, subject to the creditors' orders, for he did not owe the debt. It would be most inequitable to allow the creditors a judgment against the sheriff for the value of horses which he never bought, and holds subject to the order or disposition of the mortgagees.

A thorough examination of the record impresses me with the honesty of the sheriff throughout the entire transaction, and

his constant effort to serve the creditors and collect the debt. The rights of the creditors were never impaired or injured up to the institution of this suit, and the only possible cause of complaint which they ever had was the failure of the sheriff to re-advertise the property bid off by Kier. But when I consider that the horses and the money were tendered to the mortgagees, and that neither of them, nor their attorney, requested or directed a resale, even this cause of action falls to the ground. Perhaps upon a resale of this property it might bring enough to pay the debt. The duty of courts is to do justice between parties, but how could that be done in this instance by giving a judgment against the sheriff? This is a proceeding against him in the nature of damages for failure to do his duty, and if he should satisfy the judgment rendered by the District Court he would not own the horses, nor would he be subrogated to the rights of the mortgagees. To my mind it is plain that the sheriff has not neglected any official duty; that he has paid over all the money collected at the sale; that he is not liable for the failure of Kier to pay his bid; and if the plaintiff and intervenor have not collected their debt from Kinyon, it is their own fault, in not directing the resale of the property purchased by Kier. I conclude that there is neither law nor equity in the creditors' demands; that the striking out of the defendants' evidence was erroneous, and the judgment for plaintiff and intervenor on motion should be reserved, reserving to the plaintiff and intervenor their right to resell the horses bid off by Kier, and also their rights against the sheriff for any damages which may accrue to them for his failure to produce the same, or account for the proceeds of those horses he may have sold since the sale, September 5, 1887. For whatever damages the sheriff may occasion by his acts he is responsible personally, but his sureties are only bound to the extent of the amount named in their bond, and therefore the judgment is erroneous in condemning the sureties to pay any sum in excess of \$5,000, the penalty named in the bond. For these reasons I dissent from the opinion of the majority of the court in this case.

**POWDER RIVER CATTLE COMPANY, RESPONDENT,
v. COMMISSIONERS OF CUSTER COUNTY, AP-
PELLANT.**

9	145
22	587
22	588

9	145
32	509

9	145
139	33

PRACTICE — Error of law — New trial. — An order of the court made before trial is not an error which can be made a ground for a new trial.

FOREIGN CORPORATION — Failure to file certificate — Right to sue. — The failure of a foreign corporation to file a copy of its charter, or certificate of incorporation, with the secretary of the Territory and in the recorder's office of the county wherein it intends to transact business, as required by section 442, fifth division, Compiled Statutes, does not deprive it of the right to sue in the courts of this Territory, where the cause of action is not based upon any act or contract of the corporation in the conduct of its business.

ACTION AGAINST COUNTY — Presentation of claim. — The presentation of a claim to the board of county commissioners is a condition precedent to the commencement of an action against the county for its recovery.

SAME — Sections 762 and 764, fifth division, Compiled Statutes, construed. — A claim against a county for the repayment of taxes paid under protest is an "account" within the meaning of sections 762 and 764, fifth division, Compiled Statutes.

Appeal from Third Judicial District, Yellowstone County.

The cause was tried before LIDDELL, J.

Statement of facts, prepared by the judge delivering the opinion.

The plaintiff is a corporation, organized under and by virtue of the laws of the kingdom of Great Britain and Ireland, and at the times mentioned in the complaint was doing business in the Territory of Montana, rearing, buying, and selling cattle, horses, and live-stock generally. The plaintiff, during the year 1885, had a ranch in Custer County, Montana, and had cattle and horses in said county and Territory during that time. The plaintiff has never filed a copy of its charter or certificate of incorporation either in the office of the secretary of the Territory or in the office of the recorder of Custer County, as required by section 442, division 5, Compiled Statutes, or any statement in connection with such copy, as required by law. The county assessor, in September, 1885, listed the property of the plaintiff at 10,000 head of cattle, valued by him at the sum of \$200,000, and returned said list, together with the assessment roll for the year 1885, to the office of the county clerk of Custer County. The list aforesaid was made without a previous demand made by the assessor upon the plaintiff. In November, 1885, the

board of county commissioners, sitting for the equalization of taxes, increased the assessment by adding "\$2,000 on account of horses." Thereafter the assessment, valuation, and the tax, amounting to the sum of \$4,954, was placed upon the tax list, and was sent to the treasurer for collection. In May, 1886, the treasurer threatened to seize and sell the cattle of the plaintiff because the taxes had not been paid, and the plaintiff, in order to avoid the threatened seizure, paid the amount claimed, said payment being made under protest. The plaintiff thereupon brought suit to recover the amount so paid by it, deducting the sum of \$1,964, which, it admits, is properly due the defendant. The other facts appear in the opinion. The defendant appeals from the judgment, and from an order denying a new trial.

J. W. Strevell, and James H. Garlock, for Appellant.

The legislative assembly, in sections 756, 762, 764, 765, and 777, use the words "account" and "claim" interchangeably, as meaning the same thing. There can be no doubt that the word "account," as used in section 762, is plainly intended to mean every claim or demand against a county, which is required to be satisfied by the payment of money. It is not pretended that plaintiff's claim was ever presented. This is a condition precedent to the right of the plaintiff to maintain any action for its recovery. (*First Nat. Bank v. Custer County*, 7 Mont. 464; *Price v. Sacramento County*, 6 Cal. 254; *McCann v. Sierra County*, 7 Cal. 121; *People v. San Francisco County*, 28 Cal. 430; *Alden v. Alameda County*, 43 Cal. 279.) The language of the California statute, so far as regards the determination of the case, is identical with the statute of this Territory. (*Rhoda v. Alameda County*, 52 Cal. 350; *Christie v. Sonoma County*, 60 Cal. 164; *Rhoda v. Alameda County*, 69 Cal. 523.) The rule is a just one, and is adopted in several of the States and Territories. (*Fenton v. Salt Lake County*, 3 Utah, 423; *Smith v. Mohave County*, Ariz. Sept. 1885, 8 Pac. Rep. 160; *Chapman v. Wayne County*, 27 W. Va. 496; *Orange County v. Ritter*, 96 Ind. 362; *Curtis v. Cass County*, 49 Iowa, 421; *Lawrence County v. Brookhaven*, 51 Miss. 68; *Luzerne County v. Day*, 23 Pa. St. 141; *Belmont County v. Zeigelhofer*, 38 Ohio St. 523.)

Statutes of the character of the ones we are considering are

not repugnant to any constitutional provision, and the Territory is not prohibited from imposing such conditions as the legislative assembly may think fit, upon the coming of foreign corporations to carry on their business in this Territory. (*Bank of Augusta v. Earle*, 13 Peters, 519; *Paul v. Virginia*, 8 Wall. 169; *Ducat v. Chicago*, 10 Wall. 410; *Doyle v. Cont. Ins. Co.* 94 U. S. 535; *Phila. Fire Assoc. v. New York*, 119 U. S. 110; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; *People v. Fire Assoc.* 92 N. Y. 311-324.)

The plaintiff as a foreign corporation has never placed itself in a position where it could enforce a right of action against a county in the courts of the Territory, even if it had one. (*Cincinnati etc. v. Rosenthal*, 55 Ill. 85-91; *Semple v. Bank of British Columbia*, 5 Sawy. 88; *American Ins. Co. v. Stoy*, 41 Mich. 385; *Goodwin v. Col. Mortg. Co.* 110 U. S. 1; *Thorne v. Travelers' Ins. Co.* 80 Pa. St. 15; *In re Comstock*, 3 Sawy. 218; *Bank of British Columbia v. Page*, 6 Or. 431.)

It was the duty of the plaintiff, being a non-resident, to furnish a list of its property for taxation. (*McMillan v. Carter*, 6 Mont. 215.) The assessor was not required to make a demand at any place outside the Territory before being authorized to make the list himself. (*Hart v. Plum*, 14 Cal. 149-154; *Robb v. Robinson*, 66 Iowa, 500.) If the plaintiff objected to the assessment and valuation of its property as erroneous, it was its duty to apply to the county commissioners sitting as a board for the correction of the assessment roll, to have the error corrected. (*Stanley v. Supervisors etc.* 121 U. S. 535-550; *Balfour v. Portland*, 28 Fed. Rep. 738; *Williams v. Supervisors etc.* 122 U. S. 154; *San Jose Gas Co. v. January*, 57 Cal. 614; *Bucknall v. Story*, 46 Cal. 589; *Buffalo & S. L. R. R. Co. v. Supervisors*, 48 N. Y. 93-105; *Felsenthal v. Johnson*, 104 Ill. 21; *Adsit v. Lieb*, 76 Ill. 198; *Madison County v. Smith*, 95 Ill. 328; *Butterworth v. St. Louis Bridge Co.* 123 Ill. 536.) The commissioners had jurisdiction under the statute to increase the assessment of plaintiff's property. (*Robb v. Robinson*, 66 Iowa, 500; *Hart v. Plum*, 14 Cal. 149.) The allegation of the complaint is not sufficient to show that any part of the taxes were paid under protest. (2 *Desty on Taxation*, 797; *Meek v. McClure*, 49 Cal. 623-628; *De Fremery v. Austin*, 53 Cal. 380.)

Turner & Burleigh, for Respondent.

The statutes of Montana relating to foreign corporations, properly construed, have no application to this case. (*Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727; *Utley v. Clark-Gardner Co.* 4 Colo. 369.) There is no requirement of law that a claim for taxes illegally exacted must be presented to a board of county commissioners before suit. (§§ 744, 746, 748, 749, 750, 751, 756, 777, 762, fifth div. Comp. Stats.; *Clear Lake W. Co. v. Lake County*, 45 Cal. 90; *Bank of California v. Shaber*, 55 Cal. 322; *Bloom v. San Francisco*, 64 Cal. 503; *Lehn v. San Francisco*, 66 Cal. 76; *Reardon v. San Francisco*, 66 Cal. 506; *Waitz v. Ormsby Co.* 1 Nev. 370; *Clapp v. County of Ceder*, 5 Iowa, 15; *Taylor v. Mayor etc. of New York*, 82 N. Y. 10, 25.) Plaintiff's claim is not an account. (*Stringham v. Winnebago County*, 24 Wis. 594; *Whitwell v. Willard*, 1 Met. 216; *O'Brien v. Supervisors*, 2 Sand. 460.) The assessor gave the plaintiff no opportunity to list its own property, which is a condition precedent to the right of the assessor to list it under the law as it was in 1885. (*Northern Pac. R. R. Co. v. Carland*, 5 Mont. 171.) Taxes can only be collected from the citizen by a particular proceeding, in strict conformity with the law, and whenever the officers charged with the levy and collection make material departures from the substantial requirements of law, their proceedings are illegal and void, and no obligation on the part of the tax-payer to pay such taxes arises by reason of such illegal and void proceeding. (*Ferris v. Coover*, 10 Cal. 633; *People v. Pearis*, 37 Cal. 262; *People v. Pittsburg R. R. Co.* 67 Cal. 625; *Moss v. Shear*, 25 Cal. 38; *People v. Hastings*, 29 Cal. 450; *Brady v. Seaman*, 30 Cal. 611; *Lake County v. Sulphur B. Q. M. Co.* 66 Cal. 17.)

BACH, J.—Before the trial of this cause the defendant moved for judgment upon the pleadings. The court denied the motion, and the action of the court is enumerated as “one of the errors of law occurring during the trial,” in the specification of errors attached to the statement on motion for a new trial. An order of the court made before trial cannot be an “error of law occurring during the progress of the trial,” and therefore is not an error of law which can be made a ground for a new trial. (See

Scherrer v. Hale, ante, page 63, decided at this term of court.) But the defendant, upon the trial, objected to the admission of testimony, and the grounds upon which the objections were made are similar to those upon which the motion was based, and they are thus, by virtue of his exceptions and specifications of error, properly before this court.

The first claim made by the defendant attacks the right of the plaintiff to sue. Since the decision of the case of *Paul v. Virginia*, 8 Wall. 168, the doctrine has been well settled that, subject to certain exceptions, a State may prescribe the terms upon which foreign corporations, including corporations organized under the laws of a sister State, shall carry on business within its borders. This rule, with the exceptions, is thus briefly and clearly announced by that eminent jurist, Mr. Justice Field: "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate, or foreign." (See *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, and cases cited.) This rule is not questioned, and the validity of the territorial law is not attacked by the respondent, the plaintiff corporation. It maintains, however, that the law does not prohibit the maintenance of a suit by a corporation in this Territory, because such corporation has failed to comply with the law. This position, we think, is correct. It is well settled that, by the comity of nations, a corporation erected by one sovereignty may carry on business in another, and may sue in its courts (see Taney, C. J., in *Bank v. Earle*, 13 Peters, 519); and the statute of our Territory takes away the former, and not the latter, power. Even upon a contract made in violation of the law, the question for the court to decide would be, not the right of plaintiff to sue, but the validity of the cause of action.

We think that counsel for defendant does not reason correctly upon this point. He looks to the penalty in order to discover what is prohibited by the law, instead of looking at the prohibition, and then applying the penalty. That which is prohibited is the conducting of business; and, when the law is violated,

then all "acts and contracts" in the conduct of business are void. But these acts which are void are the acts and contracts of the corporation. The statute does not mean that a corporation cannot protect its property; does not allow others to confiscate the property of the corporation. If the appellant is correct, if a foreign corporation which has failed to comply with section 442 cannot sue in our courts, then it cannot defend; because the defense of a suit is the "act" of the corporation to the same extent as is the prosecution of a suit. If it cannot defend, any suit, however unjust, however outrageous, can successfully be maintained against it; for it cannot testify, it cannot interpose an answer, since that would be an act. If it cannot sue, there will be no remedy in its behalf for property stolen from it. The law does not prohibit such a corporation from coming within the limits of our jurisdiction. It merely declares that it shall do no business until it complies with certain requirements. The prohibition applies to its business, which means the carrying out of those purposes for which such corporation was organized. All the cases cited by the appellant depend upon this theory. In no case cited did the court decide that the corporation had no authority to sue. The reason given in each case was that the contract was void as against the public policy, as declared by statute, and therefore could not be enforced. (See *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727-733.)

The point is clearly raised when applied to cases for tort where there is no contract, and where the act complained of was directed against a corporation. In the case of *Utley v. Clark-Gardner Mining Co.* 4 Colo. 369, which was an action to recover damages for trespass, the defendant on appeal was the plaintiff in the court below, and was a corporation organized under the laws of New York. It had failed to comply with the laws of Colorado, which required the filing of a certificate similar to that mentioned in section 442, and which prohibits a foreign corporation from carrying on "any business" until such certificate is filed. The law is so similar to ours that one is led to believe that it is the statute from which ours is derived. In considering the question of the capacity of the corporation to sue, and fully admitting the validity of the law, and that it was prohibitory to the full extent of the terms thereof, the court say: "Ordinarily

they [corporations] have the power to sue; the power to contract limited to the objects of the company; and the power to acquire, as well as to hold and enjoy, real and personal property, limited to the necessities of the company. Taking language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers. By the exercise of their corporate powers it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations, and acquires rights. By its power to sue it does not seek to do business, as that term is generally understood, but enforce rights springing from business transactions. By the comity of States composing the Union a corporation created by the laws of one State may exercise all the enumerated powers in any other State, in the absence of any prohibitory statute or conflicting policy. (Story on Constitutional Laws, § 38.) Our prohibitory statute must be interpreted with reference to this general doctrine, and language affecting the capacity of a company to contract or acquire real or personal property must not be enlarged to prohibit the exercise of another and independent power, that might be exercised by virtue of this general rule or comity which existed prior to the adoption of the statute. The question is, how far is this general rule modified or abridged by the statute? The prohibition extends to doing business before compliance with the terms of the statute. We do not think this an abridgment of the right of a foreign corporation to sue. It extends only to the exercise of the powers by which it may be said to ordinarily transact or carry on its business."

We are of the opinion that the statute prohibits merely the carrying on of business; that the penalty for violating the law is that the acts and contracts in the course of such business are void; but that the law does not deprive a foreign corporation of any right to sue, although the law may prevent the enforcement of any contract by such foreign corporations as refuse to comply with the law. It will be observed that the cause of action is not based upon any act of the plaintiff corporation, but upon the alleged illegal act of the defendant. It must be further remembered that the action is really based upon a tort,

although, by a fiction of law, it is an action, "sounding in contract."

We are of the opinion, as we have already intimated, that this action is not based upon any act or contract of the plaintiff declared void by the statute, because it is not an act or contract made by the plaintiff in the conduct of his business; and that, as far as this point is concerned, plaintiff could maintain this cause of action.

The next point made by the appellant is that the plaintiff has never presented its claim to the board of county commissioners, which appellant claims is a condition precedent to the commencement of an action against any county. Appellant relies upon sections 762 to 764, division 5, Compiled Statutes. Counsel for respondent has cited many cases under statutes differing from ours, which hold that under those statutes no demand is necessary. The general principle has been settled by this court in a recent case (see *First Nat. Bank v. Custer County*, 7 Mont. 464), and the doctrine there announced is supported by cases in California under statutes similar to ours. (See *Rhoda v. Alameda County*, 52 Cal. 350.)

Counsel for respondent also claims that the law applies strictly to "accounts," as the word is used in section 762; accounts involving items. With this we do not agree. Section 764 provides for the appeal from the decision of the county commissioners, and there the word used is "claim," and section 777 gives the commissioners power to summon witnesses "whom they may deem necessary to examine in the investigation of any account or claim against the county." It is made the duty of the county commissioners to settle the indebtedness of the county, to authorize the payment of the debt by an order upon the county treasurer, who can pay money only upon such order, except "when specified provision for the payment thereof is or shall be otherwise made by law" (see § 891); and the county treasurer cannot even pay a judgment without the proper voucher for the payment (see § 751); and the proper voucher would seem to be the order of the board of commissioners. The purpose of the statute is quite apparent. It is to protect the people from unjust payments ordered by the commissioners, and to protect them from unnecessary expenses of litigation. Any

tax-payer may appeal from any order made by the board, and directing the payment of money (§ 764); and, on the other hand, the board is authorized to pass upon all claims for the payment of money against the county, and thus avoid the unnecessary costs involved in an action at law in all cases where they consider the demand just and legal. The demands against a county are numerous; and it is only just and proper that the representatives of the county should have an opportunity to examine and pass upon such accounts or demands before they are made the subject of an action at law. (See *Luzerne County v. Day*, 23 Pa. St. 141; *Lawrence County v. City of Brookhaven*, 51 Miss. 68.) In the case of *Hohman v. Comal County*, 34 Tex. 36, under a different statute, the court gives the reason for the law, that the policy of the law is to place the commissioners in the same positions as executors and administrators, upon whom a demand must be made before they can be made defendants in an action for debt.

Counsel cites the case of *Stringham v. Winnebago County*, 24 Wis. 603, in which the court say that it was not the purpose of the legislature that the law should apply to claims arising out of a tort. The court bases its opinion upon the impracticability of a rule which obliges the commissioners to decide grave questions of law, and to investigate many issues of fact. With great respect for the opinion of the court of Wisconsin, we can find no force in that reason. Accounts based upon contracts involve questions of law. The question of the salary of an officer involves the interpretation of statutes, as our own reports will show, and such questions are plainly within the requirements of the statute. Moreover, the board of county commissioners has its legal adviser, the attorney for the county; and we cannot see that intricate questions of fact are apt to arise more frequently in actions of tort than in actions of contract. Moreover, the board has power to summon and investigate any witness who can throw light upon the subject. (See, also, upon this very question, *Maddox v. Randolph County*, 65 Ga. 216.)

We are of the opinion that this cause must be remanded for a new trial, because the proper demand was not made.

There are other questions before us in this cause. We refuse to pass upon them, and have avoided stating them and the facts

upon which they are based, because they involve the interests of the public in grave and serious matters, and because they are not necessary to a reversal of this cause, and because the point already passed upon may, for aught we know, finally dispose of the action.

BLAKE, C. J., and DE WOLFE, J., concur.

WIBAUX, APPELLANT, v. GRINNELL LIVE STOCK
COMPANY ET AL., RESPONDENTS.

PARTIES DEFENDANT — Practice — Principal and surety. — Where a bond is executed by sureties for the fulfillment of a contract entered into by their principals in a separate instrument, both principals and sureties may be sued jointly in an action for a breach of the contract.

CONTRACT — Liquidated damages — Penalty. — A contract for the sale of cattle stipulated a fixed sum to be paid to the purchaser upon a failure of the owners to deliver the entire number of cattle called for therein, but did not require the purchaser to accept at any one time a less number. The owners delivered a less number, which was accepted by the purchaser. *Held*, that the sum stipulated in the contract was an agreement for liquidated damages, but by the acceptance of a part performance, was changed into an agreement in the nature of a penalty, under which only such damages could be recovered as resulted from a partial breach of the contract.

Appeal from Third Judicial District, Custer County.

The demurrer to the complaint was sustained by LIDDELL, J.

STATEMENT OF FACTS.

This was an action brought by the plaintiff (appellant in this court) against the Grinnell Live Stock Company for the alleged breach of a contract for the delivery of cattle, and with said company are joined as defendants T. L. Kimball and George W. Holderge, who are sued as guarantors or sureties of the cattle company for the fulfillment of the contract on its part. The allegations of the complaint material to be stated are in substance these: The plaintiff and said cattle company, on the 25th of August, 1888, entered into a written contract, whereby the plaintiff bought, and the cattle company sold, certain stock cattle, estimated at from 3,000 to 4,500 head (the number being indefinite, but not less than the former nor more than the latter

9	154
13	72
13	305
22*	492
32*	163
34*	188
9	154
14	135
22*	492
35*	959
9	154
17	453
9	154
24	64
24	65

number), and to include the cattle that could with ordinary work and diligence be collected from the range of the cattle company on Hanging Woman Creek, within the limit as to number above mentioned. The cattle were to consist of 150 bulls, and the remainder of young cattle of both sexes; the calves not to be counted in the delivery, nor paid for by the purchaser, and not more than 450 yearling cattle were to be delivered. The plaintiff agreed to pay for said cattle \$20 per head, and the delivery was to be between the 1st of October and the 1st of November, 1888. The contract further stipulates that the sum of \$15,000 shall be forfeited by the plaintiff if he fails to comply with the terms of the contract. This amount the plaintiff paid the cattle company on the execution of the contract; while the cattle company, as surety for the fulfillment of the contract by it, agreed to and did give a bond in the sum of \$15,000, with the defendants Kimball and Holderge as sureties. This \$15,000 paid by the plaintiff, and secured by the cattle company, is referred to in the contract in one place as a penalty, and in another as liquidated damages. Plaintiff alleges that he performed all the conditions of said contract to be performed on his part, and was ready, able, and willing to receive and pay for all the cattle called for by said contract within the time specified for delivery. But said cattle company neglected and failed to deliver said cattle, except 123 bulls, 889 cows, and 317 yearlings; in all, 1,329 head, not reckoning calves. The complaint further alleges that the defendant cattle company had on its ranges not less than 4,000 head of cattle of the quality described in the contract, which, by the use of ordinary work and diligence, it could have delivered under the contract; and this is assigned as the breach of the contract on the part of the cattle company. The failure to pay the \$15,000 is assigned as the breach of the contract on the part of the cattle company and the sureties on the guaranty. The action is against the cattle company, and the sureties on the separate guaranty, and alleges damages in the sum of \$15,000, and prays for judgment for that amount. The defendant demurred to the complaint on several grounds: *First*, because of misjoinder of parties defendant; *second*, because several causes of action are improperly united; *third*, because the complaint does not state facts sufficient to con-

stitute a cause of action. The court sustained the demurrer on the last ground of demurrer, and, upon the plaintiff refusing to amend, rendered judgment against him for costs. To review this action of the court in sustaining the demurrer, this appeal is prosecuted.

Strevell & Porter, and *James H. Garlock*, for Appellant.

Where a contract is alleged and a breach or breaches are set out in the complaint, a general demurrer to such complaint will never be sustained. (1 Sutherland on Damages, 11; *Cowley v. Davidson*, 13 Minn. 92; *Wilson v. Clarke*, 20 Minn. 367; *Rider v. Pond*, 19 N. Y. 262; *McCarty v. Beach*, 10 Cal. 463; Sedgwick on Damages, 53; *Marzetti v. Williams*, 1 Barn. & Adol. 415; *Loeb v. Kamak*, 1 Mont. 155.) As to what items may be proved under a general allegation of damages, see, 1 Sutherland on Damages, 763; 1 Chitty on Pleading, (16th Am. ed.) 348; *Laraway v. Perkins*, 10 N. Y. 371; 2 Sedgwick on Damages, 606, n. a; *Roberts v. Graham*, 6 Wall. 578; *Jutte v. Hughes*, 67 N. Y. 267; *Spencer v. St. Paul etc. R. R. Co.* 21 Minn. 362.)

The parties to this contract have stipulated their mutual measure of damages in the following words: "And for the true and faithful performance of all and every one of the covenants and agreements above and hereinafter mentioned, the parties to these present bind themselves, each unto the other, in the penal sum of \$15,000, as liquidated damages to be paid by the failing party." The plaintiff paid the sum of \$15,000, the stipulated forfeit money, when the contract was signed. The defendant after having the plaintiff's money executed a bond in the like sum of \$15,000. The defendant meant beyond all peradventure or doubt to have its damages liquidated in this contract, and that there should be no paltering or delay takes them in advance. The intention of the plaintiff that the contract shall be one for liquidated damages is evinced by this payment of the stipulated sum, which he consents shall be forfeited if he fails to stand by his obligation. The office of courts is to ascertain the intent of the parties, and, if not contrary to law, to carry their intent into execution. (Best, C. J., in 2 Sedgwick on Damages [7th

ed.], 231; *Dakin v. Williams*, 17 Wend. 447.) If this is a contract where the parties to it have clearly intended to adjust and liquidate the damages which would attend its breach, there ought not to be any hindrance in giving it effect. (2 Sedgwick on Damages [7th ed.], 241, 246, 247.) The words "penal" and "penalty" seem often to be used as equivalent terms; but contracts containing either or both of the terms have yet been adjudged to be contracts for liquidated damages. (2 Chitty on Contract [11th Am. ed.], pp. 1314, notes, 1318, 1319.) The term "penalty" is not invariably conclusive. (*Harris v. Hardy*, 3 Hill, 393; *Streeper v. Williams*, 48 Pa. St. 450; *People v. Love*, 19 Cal. 677.) The cases in which the sum specified was enforced as liquidated damages, though called by the parties a penalty, are *Santer v. Ferguson*, 7 Com. B. 716; *Pierce v. Fuller*, 8 Mass. 223; *Fisk v. Fowler*, 10 Cal. 513; *California Steam Nav. Co. v. Wright*, 6 Cal. 258; *Streeter v. Rush*, 25 Cal. 67; *Parr v. Village of Greenbush*, 112 N. Y. 246; *Little v. Banks*, 85 N. Y. 258; *Kemp v. Knickerbocker Ice Co.* 69 N. Y. 45; *Noyes v. Phillips*, 60 N. Y. 408; *Leggett v. Mutual Life Ins. Co.* 53 N. Y. 394; *Celment v. Cash*, 21 N. Y. 253.) That it is competent and lawful for parties in their contracts to stipulate and settle their damages is not denied by any authority we have seen. (*Davis v. Hendrie*, 1 Mout. 499.) In nearly all of the more recent decisions the court rests the solution upon the intent of the parties as gathered from the language of the instrument. (*Jaqua v. Headington*, 114 Ind. 309; *Maxwell v. Allen*, 78 Me. 32; *Hart v. McGrew*, Pa. Nov. 7, 1887, 11 Atl. Rep. 617; *Eakin v. Scott*, Tex. Apr. 10, 1880, 7 S. W. Rep. 777.)

E. R. French, C. R. Middleton, and Word & Smith, for Respondents.

The contention here on the part of the respondents is that the sum of \$15,000 is provided in the contract as a penalty or penal sum, and that plaintiff's damages, if any have been sustained, would consequently have to be alleged and proved, and his recovery limited to such amount as the evidence would warrant. (1 Sutherland on Damages, 478; 2 Sedgwick on Damages [7th ed.], 215, 216, 469; 1 Sutherland on Damages, 490, 503, 507,

508; 5 Am. and Eng. Encyc. of Law, 27, and cases cited; *Cheddwick v. Marsh*, 21 N. J. L. 463; *Shreve v. Brereton*, 51 Pa. St. 175.) Let it be noted that the words here used are ambiguous. (2 Sedgwick Meas. Dam. 216; 1 Sutherland on Damages, 480, 481, and notes; 3 Parsons on Contracts [5th ed.], 157; *Lampman v. Cochran*, 16 N. Y. 275; *Davis v. Gillett*, 52 N. H. 126; S. C. 1 Sutherland on Damages, 487, n.; *Kemble v. Farren*, 6 Bing. 141; *Berry v. Wisdom*, 3 Ohio St. 241; *Streeter v. Rush*, 25 Cal. 68; 5 Am. and Eng. Encyc. of Law, 24, and notes; 1 Addison on Contracts, § 496.) Where, as in this case, the damages actually suffered are in the nature of things ascertainable, and the sum named is, or may be, grossly disproportioned to them, the very strongest grounds are presented for construing such sum as a penalty. (*Scofield v. Tompkins*, 95 Ill. 190; *Lansing v. Dodd*, 45 N. J. L. 525; Chitty on Contracts [9th Am. ed.], § 894; 1 Sutherland on Damages, 503, 504; 5 Am. and Eng. Encyc. of Law, 25; *Berry v. Wisdom*, *supra*; *Streeter v. Rush*, *supra*.)

For the partial breach of contract alleged, the plaintiff must allege actual damages, and prove them. (*Watts v. Camora*, 115 U. S. 353; 1 Sutherland on Damages, 521, 525, and cases, 528, n. 1 to p. 524; 3 Parsons on Contracts, 156, et seq.; *Farrar v. Beeman*, 63 Tex. 175.) Plaintiff must allege and prove a specific demand for performance, in respect to the particular matters wherein the alleged breach consists, before an action can be maintained. (5 Am. and Eng. Encyc. of Law, 527, et seq., and notes; 2 Parsons on Contracts, 517, 519, and notes.) For a full explanation of the distinction made by the courts between penalties and liquidated damages, see 3 Parsons on Contracts (5th ed.), 156, et seq., and notes; *Astley v. Weldon*, 2 Bos. & P. 346, 363; *Kemble v. Farren*, 6 Bing. 141; *Edwards v. Williams*, 5 Taunt. 247; *Street v. Rigby*, 6 Ves. 815; *Beckham v. Drake*, 8 Mees. & W. 846, 853; *Atkins v. Kinnier*, 4 Ex. 776; *Dakin v. Williams*, 17 Wend. 447, 455; *Muldoon v. Lynch*, 66 Cal. 540; *Heard v. Bowers*, 23 Pick. 455; *Moore v. Platte Co.* 8 Mo. 467; *Curry v. Larer*, 7 Pa. St. 470; *Beale v. Hayes*, 5 Sand. 640. On appeal to this court, if for any cause the judgment below was proper, it will not be disturbed. (*McMullen v. Armstrong*, 1 Mont. 486.)

It is clear that two causes of action were improperly united in one complaint, and parties defendant were improperly joined in the same action.

DE WOLFE, J.—An examination of the complaint shows, we think clearly, that it states a cause of action against one or all of the defendants. The contract between plaintiff and defendant company, and also the guaranty entered into by the defendants, Kimball and Holderge, on behalf of the cattle company, are set forth *in hæc verba*, and with sufficient averments to constitute a cause of action. In this respect the complaint is rather redundant than insufficient in allegation. Nor can it be said that several causes of action have been improperly united. The action is one for damages for an alleged breach of contract, and for which it seeks to make all the defendants liable. If a demurrer lies at all to the complaint, it must be on the first ground stated, on account of a misjoinder of parties defendant. As will be observed from the statement, the cattle company are sued for the alleged breach of contract in failing to deliver the cattle called for by its terms, and for the failure to pay the \$15,000 penalty or liquidated damages which it agreed to pay in case of failure. The defendants, Kimball and Holderge, are sued on their contract of guaranty or suretyship. The cattle company did not join the last-named defendants in the instrument of guaranty executed by them. Nor are Kimball and Holderge liable on the contract between the plaintiff and the cattle company, except as their liability arises from the guaranty. The instruments are distinct, while both relate to the same subject. It follows that the liability of the defendants is separate and distinct in some respects, and that of each must be sought for and determined from the contract separately made by them. In no event can the defendants, Kimball and Holderge, be held for any sum above \$15,000, whatever may be the liability of the cattle company under its contract. Whether they are liable for that amount will depend upon the damages sustained by the plaintiff for the failure to deliver the cattle called for by the contract, and whether the \$15,000 is to be treated as a penalty, or as liquidated damages.

At the common law, parties jointly liable could not be sued

separately, while parties severally liable could not be sued jointly. If the cause of action created a joint and several liability, the plaintiff could, at his election, sue all of the defendants jointly, or each separately, but was compelled to proceed in one or the other of these modes. (1 Chitty on Pleading, 30, et seq.) The Code of Civil Procedure and the rule of pleading thereunder have changed all this; the policy of the reformed system being to lop off all effete forms, or those which serve no useful purpose, and enable a party in one action, and by a single proceeding, to subject all parties, whether jointly or severally liable, and whether upon the same or separate instruments. Section 1296 of the fifth division of the Compiled Statutes enacts as follows: "All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants." And section 20 of the Code of Civil Procedure is as follows: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may, all or any of them, be included in the same action, at the option of the plaintiff." Construing these provisions of our law in connection, we cannot doubt but what it was the intention of the legislature to do away with the technical rules which formerly surrounded parties as to whether their obligation was joint or several, and subject all or any number of them to a single action, at the option of the plaintiff, without regard to the exact nature of their liability, when measured by the former rules of pleading. The statute of New York is similar to our own on this subject, except that it leaves off the last clause, relating to sureties on the same or separate instruments. The construction of this statute came before the court of appeals of that State in the case of *Carman v. Plass*, 23 N. Y. 286. The action was against one of the defendants as principal, and the other as guarantor, for the payment of the amount stipulated to be paid by a certain lease made between the plaintiff in the action and the defendant Plass. There was a demurrer on the ground that no cause of action against the defendants jointly was set forth in the complaint. The defendants had judgment in the trial court, which was reversed in the Supreme Court, and the judgment of the latter court was affirmed in the

court of appeals. The court in its opinion says: "No doubt, a pretty radical innovation upon the common-law system of pleading was made when by the Act of 1832 the several obligations of parties to a bill or note were allowed to be enforced in a single action. But this had become familiar law when the Code was written, and it seems then to have been considered that the principle might be usefully extended to cases like the present; and the section referred to appears to me to have been framed for that purpose." (*Carman v. Plass*, 23 N. Y. 288.) The question came before the Supreme Court of California in the case of *Powell v. Powell*, 48 Cal. 235, and arose on two bonds of the defendant, J. N. Powell, as executor of the estate of G. W. Powell, deceased, against him as principal, and his co-defendants as sureties. The sureties on the two bonds were different, and the two bonds were executed at different times, but both were conditioned that the defendant Powell should, as executor, faithfully execute the duties of his trust according to law. The defendant Powell, having been removed from the office of executor, was ordered by the court to pay to his successor, as administratrix of the estate, certain moneys in his hands belonging to the estate; and, failing to do so, the action was brought against him, and the sureties on both bonds, to recover the amount. Each set of sureties demurred separately that they had been improperly joined in the same action, and that two causes of action had been improperly united. The demurrers were sustained in the trial court, but this ruling was reversed in the Supreme Court, the court in its opinion saying: "The sureties who are sued, as observed already, though executing separate bonds, assumed a common burden, and, as being sureties on separate instruments, may be properly joined as co-defendants in the action;" referring to the section of the Code of that State which corresponds with section 20 of our Code, recited *infra*. Other authorities could be cited in support of the same principle, but the statute is too plain for misinterpretation as to the right of the plaintiff to sue the sureties jointly with the cattle company in the present action.

We come, then, to the other and more difficult question raised in the argument, and in the brief of counsel, as to whether the \$15,000 mentioned in the contract is to be treated as a penalty,

or as liquidated damages. It is designated in the contract by both these appellations. This, however, is not decisive of the question, as the authorities establish the rule that it will be held as one or the other, according to the intent of the parties, and without giving any special stress to the use of either expression; the word "penalty" sometimes being held to be fixed or liquidated damages, and the use of the latter words being sometimes held to be intended as a penalty, and to cover only the actual damages sustained. In *Noyes v. Phillips*, 60 N. Y. 408, the court, on this subject, says: "The word 'forfeit' is not conclusive. A fundamental rule upon this subject is that the words employed must, in general, yield to the intention of the parties as evinced by the nature of the agreement, the amount of the sum named, and all the surrounding circumstances." The cases on the subject are very numerous, but a review of most of them would, besides taking much space, serve no very useful purpose, as they were mostly decided upon the particular facts of each case, so that from them no fixed or uniform principle can be deduced. The authorities all lay down the general principle that the parties to contracts may stipulate for liquidated damages for its breach, and that courts will uphold agreements of this kind when it is plainly the intention of the parties. Sutherland, in his work on Damages, lays down the rule in the following language: "Parties, in making contracts, are at liberty to stipulate the amount which shall be paid by either party to the other as compensation for the anticipated actual loss or injury which they foresee or concede will result from a breach, if it should occur. The sum which they so fix becomes, on the happening of the event on which its payment depends, the precise sum to be recovered, and the jury are confined to it; nor will equity relieve from the payment of it." (1 Sutherland on Damages, 475.) Parsons, in his work on Contracts, states the rule in the following language: "The law will permit parties to determine, by an agreement which enters into the contract, what shall be the damages which he who violates the contract shall pay to the other; but it does not always sanction or enforce the bargain they may make on this subject. . . . Where the parties make this agreement, but not in such wise that the law adopts it, then the damages thus agreed upon are a penalty, or

in the nature of a penalty. And the question whether damages agreed upon are to be treated as liquidated, or as in the nature of a penalty, and therefore reduced to the actual damage, often occurs, and is not always of easy or obvious solution." Further on, in the same chapter, the author says: "One rule for determining the question is this: that the action of the court shall not be defined and determined by the terms which the parties have seen fit to apply to the sum fixed upon. Though they call it a 'penalty,' or give to it no name at all, it will be treated as liquidated damages; that is, it will be recognized and enforced as the measure of damages, if, from the nature of the agreement and the surrounding circumstances, and in reason and justice, it ought to be. And, although they call it 'liquidated damages,' it will be treated as a penalty, if, from a consideration of the whole contract, it appears that the parties intended it as such, or if, where the injury is certain, the sum fixed upon is clearly disproportionate to such injury, and the real claim which grows out of it." (3 Parsons on Contracts, 156, et seq.) Similar language could be cited from other authors, as well as the decisions of courts, on the question, but it is deemed unnecessary. The difficulty does not lie in the rule of law, but in its application.

We can scarcely conceive of a case where the parties have more clearly expressed their intention to fix in advance a sum as the ascertained and liquidated damages to be paid on a breach of the contract than they have done in the case now before us. They have not only fixed the amount, but, as if to place beyond the reach of either party to dispute, or call in question the sum agreed upon as damages, the cattle company exacts and recovers from the plaintiff in advance the sum agreed on, which, by the terms of the contract, it is to retain if the plaintiff fails to comply with the terms and conditions of the contract; while the cattle company, as security for the fulfillment of the contract on its part, causes to be executed and delivered to the plaintiff a bond or undertaking, with sureties, in the sum of \$15,000, conditioned for the faithful performance of the contract. No language or acts could more definitely express the intention of the parties than was used and acted on in this case; and if there had not been a partial performance on one side in the delivery

of the cattle, and an acceptance thereof by the plaintiff, we should unhesitatingly declare that the sum of \$15,000, stipulated to be paid, was to be treated as liquidated damages, and not as a penalty. The contract itself did not require the cattle company to deliver, nor the plaintiff to receive, at any one time, a less number of cattle than the entire number called for by the contract. But if the parties have voluntarily waived this right, and accepted the delivery of a part, can they now claim the entire sum stipulated to be paid as upon a total breach of the contract? We think not; and this, upon reason as well as authority. The contract, it is true, provides for the payment of the sum agreed upon as damages on a failure of either party to keep and perform "all and every one of the covenants and agreement resting upon him." This clause of the contract is to be construed with its other provisions, and particularly in connection with the stipulation as to the delivery of the cattle; and, as this does not provide for a partial delivery at one or different times, it follows that the \$15,000 was to be paid only on a total failure to deliver the cattle. If this is not so, the plaintiff could (as he has in part done) have waived his right to a full delivery at one time of all the cattle purchased, and thus have received the full benefit of the contract, and, upon the slightest failure on the part of the cattle company to deliver the full number of cattle, could allege this as a breach which would entitle him to the full sum of \$15,000. Such, we believe, was not the intention of the parties when making the contract; and it would be inequitable and unjust in the court to give it such a construction, in the absence of a manifest intention of the parties. The principle we announce is supported by many adjudications and text-writers of the highest authority. The leading English case is *Kemble v. Farren*, 6 Bing. 141. It was an action to recover the sum of £1,000 agreed upon as fixed and liquidated damages in the event of a failure of either party to comply with the terms of a theatrical engagement. The agreement in this respect was as follows: "If either of the parties should neglect or refuse to fulfill the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and

which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof." There was a partial performance or fulfillment of the contract. The action was to recover the £1,000 stipulated to be paid in case of breach. The decision was by Tindal, C. J., who in his opinion says: "It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively, also, that it should not be considered as a penalty, or in the nature thereof. . . . If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3l. 6s. 8d. per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theater, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement." This case is cited with approval by many American courts, and is the recognized authority on this subject in the courts of England. We cite the following additional authorities: *Hoagland v. Segur*, 38 N. J. L. 230; *Shute v. Taylor*, 5 Met. 61; *Watt v. Sheppard*, 2 Ala. 425; 1 Sutherland on Damages, 528. The latter writer thus states the rule: "For the same reason that one sum cannot consistently be compensation alike for a total and partial breach, a stated sum made payable for the former cannot, by construction, be applied to any infraction after acceptance of part performance;" and cites too many cases in note 1 in support of the rule. In *Watt v. Sheppard, infra*, the action was upon a contract for the sale and conveyance of land, and the parties stipulated for the payment of \$10,000 as liquidated damages to be paid on a failure to convey. The contract was in part executed. In its opinion the court says: "Though \$10,000 be the damages stipulated for the

failure to make title to the land, 'or any part thereof,' yet that sum cannot be recovered in the present case. It was competent for Sheppard to have refused a conveyance for a part until the title was perfected to all. . . . It was certainly an extravagant estimate for a failure to convey a part of it. . . . If the recovery was not to be diminished to the extent of the comparative value of the land conveyed, upon the same principle the entire sum stipulated would be the measure of damages if the title remained incomplete to the poorest acre in either of the tracts. Such an assumption would strike every one as unreasonable in the extreme, and producing a result never contemplated by the parties." This language is as pertinent to the facts of this case as it was to the case in which it was used, and we cannot add to its force.

From these and like authorities we think that the partial delivery and acceptance of cattle under this contract changed what we should otherwise have held to be an agreement for fixed or liquidated damages into an agreement in the nature of a penalty, under which the plaintiff can recover only such damages as he sustained from the partial breach of the contract. The cause is therefore reversed, and remanded to the District Court, with directions to overrule the demurrer to the complaint.

Judgment reversed.

BLAKE, C. J., and BACH, J., concur.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1890.

PRESENT:

HON. HENRY N. BLAKE, Chief Justice.

HON. WILLIAM H. DE WITT, } Associate Justices.
HON. EDGAR N. HARWOOD, }

9	167
9	238
9	374
9	450
10	148
10	548

9	167
14	479
23*	76
37*	8

STATE, APPELLANT, *v.* AH JIM, RESPONDENT.

CONSTITUTIONAL LAW — *Section 8, Article iii. of the Constitution interpreted — Prosecution by information.* — Section 8, article iii. of the Constitution, provides as follows: “. . . . All criminal actions in the District Court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court.” *Held*, that this clause of the Constitution did not execute itself, and before it could be carried into effect, the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the State and accused, must be defined by the legislative department.

SAME — *Grand jury.* — Section 8, article iii. of the Constitution, provides as follows: “. . . . A grand jury shall consist of seven persons, of whom five must concur to find an indictment.” *Held*, that this clause of the Constitution executes itself, and in the absence of further legislation, all offenses of the grade of felonies, or having their origin in the District Court, must be inquired into under the provisions of the Criminal Practice Act relative to indictments.

SAME — *Ex post facto law.* — *Held*, also, that the substantial rights of the accused would not be prejudiced by the submission of his case to the grand jury created by the Constitution, and that the above section of the Constitution was not *ex post facto*.

Appeal from First Judicial District, Lewis and Clarke County.

The defendant was prosecuted by information filed by the county attorney. A motion to quash the information on the ground that the county attorney had no authority to make or file it was sustained by HUNT, J.

Henri J. Haskell, Attorney-General, *C. B. Nolan*, of counsel, for State, Appellant.

1. Section 1, page 118 of the Laws of the Sixteenth Session, defines the duties of county attorney, and, among other things, empowers him to prosecute all public prosecutions. Section 8, article iii. of the Constitution, provides that all criminal prosecutions shall be prosecuted by information.

2. An information is an accusation or complaint exhibited against a person for some criminal offense. (4 Blackst. Com. 408, 409.) Section 20 of the fifth division of the Compiled Laws of Montana provides that the common law of England, in so far as it is applicable, and not in conflict with statutory enactment, shall be considered as of full force and effect. A proceeding upon information, having a well-settled and established standing at common law, under this provision, could be carried into effect; as it is a well-settled principle that when a legal proceeding is adopted, it is adopted with all the incidents which appertained to it at common law, except in so far as they may be in conflict with our form of government.

3. Without statutory authority conferred upon the county attorney to file an information, under the rules of the common law he would be the officer to whom was delegated that power. (*Territory v. Outinola*, New Mexico, 1887, 14 Pac. Rep. 809; *State v. Nulf*, 15 Kan. 404.) The next question which arises, is this proceeding in the nature of an *ex post facto* law, or, if not such, being retroactive, does it operate to divest vested rights? A law changing the mode of procedure is not *ex post facto*. (Cooley's Constitutional Limitations, 331; *State v. Manning*, 14 Tex. 402; *Calder v. Bull*, 3 Dall. 390; 7 Am. & Eng. Encyc. of Law, 531; *Perry v. Commonw.* 3 Gratt. 632; *State v. Ryan*, 13 Minn. 371; *Ratzky v. People*, 29 N. Y. 124.)

There is no such thing as a vested right to a particular

remedy. (*People v. Mortimer*, 46 Cal. 114; *People v. Campbell*, 59 Cal. 243; 43 Am. Rep. 257.)

A. J. Craven, and *C. C. Newman*, for Respondent.

Prosecution by information is in derogation of the common law, and a departure from the general policy of the law. (10 Am. & Eng. Encyc. of Law, p. 456; Wharton's Criminal Practice and Pleading, § 86; Blackstone [Cooley], book 4, ch. 23; *State v. Boswell*, 104 Ind. 546.)

The common law prescribes no form of pleading in cases of information in felony cases, nor by whom subscribed, or by whom made and presented. "The forms of pleading in criminal actions in the District Court, and the rules by which the sufficiency of pleading is to be determined, are those herein prescribed." "The only pleading on the part of the Territory is the indictment." (§§ 162, 163, Comp. Stats. div. 3.) "All criminal actions . . . shall be prosecuted by information." (Const. art. iii. § 8.)

The county attorney then must get his authority, if any he has, from the statutes of Montana, or from the Constitution. It cannot come from the statute, for at the time these laws were passed no such thing as an information was known to our laws, and could not have been in the mind of the legislator at the time the law was enacted. Then it must come, if at all, from the Constitution, and that is silent. He cannot get his authority by implication.

Neither the common law nor the statutory law, or Constitution of Montana, prescribe the form of an information in case of felony, or by whom it is to be subscribed, or how presented.

The provision of our Constitution is inoperative, and must have the vitalizing strength of additional legislation before it can have any force or effect.

Statutes in derogation of the common law are to be strictly construed. (Bishop's Criminal Practice, §§ 119, 155; *Sibley v. Smith*, 2 Mich. 480; *Sugar v. Sackett*, 13 Ga. 462; *Rathbun v. Acker*, 18 Barb. 393.)

The law as to information cannot apply to crimes committed and proceeded against before the adoption of the Constitution. As to such cases it is *ex post facto*. (*People v. Tisdale*, 57 Cal. 104; *Kring v. Missouri*, 107 U. S. 221, and cases cited therein.)

Penal statutes are to reach no further than their words; no person can be subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused. (Bishop on Statutory Crimes, 104.) We contend that this information must be quashed, and this case be presented, if at all, by an indictment from a grand jury.

BLAKE, C. J.—This is an appeal from the order of the court below sustaining the motion of the respondent to quash the information which was filed December 3, 1889, by the county attorney of the county of Lewis and Clarke. The respondent is charged with the commission of the offense of murder in the first degree upon the twenty-fifth day of August, 1889. After the arraignment of the accused a motion was made by his counsel, and sustained by the court, to quash the information, "because the county attorney in and for Lewis and Clarke County, Montana, had no authority to make or file the said information in the said action."

It is admitted that the State of Montana was legally organized on the eighth day of November, 1889, and that the crime which is described in the information was committed within the Territory of Montana. The questions which have been discussed on this hearing relate to the interpretation of the following clause of the eighth section of the third article of the Constitution: "All criminal actions in the District Court, except those on appeal, shall be prosecuted by information after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court. A grand jury shall consist of seven persons, of whom five must concur to find an indictment. A grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary, and shall so order."

In the States which are governed by constitutions containing similar provisions regarding the procedure by information, statutes have been enacted to enable the courts to secure their enforcement. The legislative assembly of Montana have not passed any law of this nature, although it is contended that the same result has been attained by the adoption of the common

law of England, when the same "is applicable and of a general nature, and not in conflict with special enactments." (Comp. Stats. div. 5, § 201.) This position is unsound, for two reasons. The Criminal Practice Act provides ample remedies for the execution of criminal laws, and necessarily conflicts with the proceedings by information at common law. In the next place, the use of this remedy has been limited to certain cases, and has not embraced felonies. Blackstone treats of this subject, and says: "There can be no doubt but that this mode of prosecution by information or suggestion, filed on record by the king's attorney-general, or by his coroner or master of the crown office in the court of king's bench, is as ancient as the common law itself. . . . But these informations, of every kind, are confined by the constitutional law to mere misdemeanors only; for, wherever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it." (4 Blackst. Com. 309, 310.) In *Ex parte Wilson*, 114 U. S. 423, Mr. Justice Gray delivers the opinion, and says: "By the law of England, informations by the attorney-general, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands or goods, or both."

There are some provisions of the Constitution which have a direct bearing upon the case at bar, and should be considered. "No person shall be deprived of life, liberty, or property without due process of law." (Art. iii. § 27.) "All laws enacted by the legislative assembly of the Territory of Montana, and in force at the time the State shall be admitted into the Union, and not inconsistent with this Constitution, or the Constitution or laws of the United States of America, shall be and remain in full force as the laws of the State until altered or repealed, or until they expire by their own limitation." (Section xx. Schedule, § 1.) "No crime or criminal offense committed against the laws of the Territory of Montana shall abate, or in any wise be affected, by reason of the change from a territorial to a State form of government; but the same shall be deemed and taken to be an offense against the laws of the State, and the appropriate

courts of the State shall have jurisdiction over, and to hear and determine, the same." (Section xx. Schedule, § 1.) "Prosecutions for criminal offenses against the laws of the Territory of Montana, pending at the time the State shall be admitted into the Union, shall not abate; but the same shall continue and be prosecuted in the name of the State of Montana, and the title of every such action shall be changed to conform to this provision." (Section xx. Schedule, § 7.) "Parties who at the time of the admission of the State into the Union may be confined under lawful commitments, or otherwise lawfully held to answer for alleged violations of any of the criminal laws of the Territory of Montana, shall continue to be so confined or held until discharged therefrom by the proper courts of the State." (Section xx. Schedule, § 8.) The Constitution prescribes the following rule for its construction: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Art. iii. § 29.) We are aided in giving effect to the foregoing sections of the Schedule by the introductory clause: "That no inconvenience may arise by reason of changing from a territorial to a State form of government, it is declared as follows."

It is evident that the clause of the Constitution respecting the information does not execute itself. All the details affecting the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the State and accused, must be defined by the legislative department. It has been observed that the States which have abolished the grand-jury system have enacted laws to carry into effect this provision of the Constitution, and the following authorities will show their importance: *Rowan v. State*, 30 Wis. 129; 11 Am. Rep. 559; *State v. Sloan*, 65 Wis. 647; *Kalloch v. Superior Court*, 56 Cal. 229; *Hurtado v. California*, 110 U. S. 516; *State v. Boswell*, 104 Ind. 541. In *Kalloch v. Superior Court*, *supra*, the court says: "But the Constitution of this State has made provision for this form of prosecution, and the legislature has furnished the machinery to enforce it. In our opinion the proceeding is a legal and constitutional one." In *State v. Boswell*, *supra*, the court says: "It seems clear to us that one who is tried and convicted upon an information provided for by a constitutional

State statute is not deprived of his liberty without due process of law; for we perceive no reason for doubting the soundness of the proposition that proceedings founded upon an information provided for by a legally enacted statute do constitute due process of law."

The solution of the legal problem relating to the information in this case includes also the question as to the mode of prosecuting or investigating the charge against the respondent under the State government. The court below did not discharge the defendant, but ordered him to be remanded to the custody of the sheriff to await its further action. When all the provisions of the Constitution which have been cited are construed together, it will be apparent that the Criminal Practice Act relative to indictments remains in full force, with two exceptions. The number of the grand jury has been reduced from sixteen to seven, and the concurrence of five members is required to find an indictment. In these incidents the Constitution executes itself; and, in the absence of further legislation, all offenses of the grade of felonies, or having their origin in the District Court, must be inquired into in this manner.

It has been maintained that the substantial rights of the respondent will be thereby impaired, and that this ruling, in its consequences, is *ex post facto*. The leading authority upon this matter is the case of *Kring v. Missouri*, 107 U. S. 221. Mr. Justice Miller, in delivering the opinion of the court, declares in the following sentence the law upon the decisive point: "Tested by these *criteria*, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him, of acquittal of the charge of murder in the first degree on conviction of murder in the second degree, is, as to his case, an *ex post facto* law, within the meaning of the Constitution of the United States." The same principle is recognized in *Hopt v. Utah*, 110 U. S. 574, and it is also held that statutes which "remove existing restrictions upon the competency of certain classes of persons as witnesses relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed

before the jury can be made applicable to prosecutions, or trials thereafter had, without reference to the date of the commission of the offense charged." In *People v. Campbell*, 59 Cal. 243; 43 Am. Rep. 257, the court says: "It is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard of the right of the legislature to make such changes questioned; neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed at the time the act was committed." (See, also, Cooley's Constitutional Limitations, 272, 331, 332; *People v. Mortimer*, 46 Cal. 114; Bishop on Statutory Crimes, §§ 178, 180.) Those authorities support the proposition that the substantial rights of the respondent will not be prejudiced by the submission of his case to the grand jury which has been created by the Constitution.

It is therefore adjudged that the order appealed from be affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

STATE, RESPONDENT, v. SULLIVAN, APPELLANT.

CRIMINAL LAW — Robbery — Possession of goods recently stolen — Instruction. —

Under an indictment for robbery, it is error for the court to charge the jury, that "the possession of goods recently stolen, or of which a person was recently robbed, is a circumstance to be considered by the jury in determining as to the guilt or innocence of the defendant. The possession, when unexplained, or not satisfactorily accounted for, by a defendant, tends strongly to establish the guilt of a defendant found in possession of goods," as the question whether the possession tended strongly or lightly to show guilt was a matter for the jury to pass upon.

SAME — Evidence — Testimony of defendant. — Where the defendant testified that he bought the goods described in the indictment, the jury may legally discard the evidence without the introduction of proof in rebuttal of his alleged purchase of the property.

Evidence reviewed and held sufficient to support a conviction of robbery.

Appeal from Second Judicial District, Silver Bow County.

The defendant was tried before DE WOLFE, J.

McBride & Haldorn, for Appellant.

9	174
17	29
17	364
9	174
30	528
9	174
32	451
9	174
34	39
9	174
40	86

There was no evidence tending to connect the defendant with the robbery, except the evidence showing him to have had possession of the property, alleged to have been stolen, some time after the robbery had taken place. Possession of stolen property is not, in itself, sufficient to warrant a conviction of even larceny. (*People v. Ah Ki*, 20 Cal. 178.) Defendant is not bound to show that he came by the property honestly, until prosecution has proven dishonesty. (*People v. Antonis*, 27 Cal. 404.) It was error for the court to charge the jury that the possession of goods recently stolen, or of which a person was recently robbed, when unexplained or not satisfactorily accounted for, tended strongly to establish guilt. (*People v. Ah Sing*, 59 Cal. 401; *People v. Cline*, 74 Cal. 575; *People v. Walden*, 51 Cal. 588.) Defendant should not be convicted of robbery, even if he received the proceeds of a robbery with knowledge of the facts. (*People v. Shepardson*, 48 Cal. 189.)

Henri J. Haskell, Attorney-General, for the State, Respondent.

BLAKE, C. J.—The appellant has been convicted and sentenced for the crime of robbery; and the indictment alleges that he took from the person of Edwin Thomas a silver watch, gold chain, door key, and certain money. The descriptions and denominations of the latter are unknown, but the value is fixed at ten dollars. Upon the trial, the following facts were established by the testimony of the witnesses for the Territory, and are conceded by the appellant in his argument: Thomas left his place of business in Butte about two o'clock in the morning of the tenth day of April, 1889, and was walking towards his home, when he was struck upon the head with a weapon or club of some kind and knocked down, and robbed by two persons of the property described in the indictment. He could not recognize the parties, or identify their clothing, but testified that he could not say that the prisoner was one of them, although his size was about the same as that of the man who knocked him down. About twenty-four hours after the occurrence, the appellant was arrested upon the charge of petit larceny, and searched by the officers. The watch and chain were found in his hip pocket; and the key mentioned in the indictment, and

"a wad of money," amounting to \$440.76, were also taken from him. He made no statement regarding these articles.

When the evidence was closed by the Territory, the counsel for the accused moved the court to instruct the jury to acquit him upon the ground that the prosecution had failed to prove the material allegations of the indictment. The motion was overruled, and this action of the court is assigned as error.

In *Territory v. Doyle*, 7 Mont. 250, this court said: "That the recent possession of stolen property is not, of itself, sufficient to justify a conviction of the possessor as a thief, is a principle very well settled. But other circumstances nearly always surround the transaction to throw light upon the possession." It appears in the case at bar that there were "other circumstances" of this character. The watch and chain were not carried by the appellant in the usual place for their safe-keeping or use, but in his hip pocket. He was silent when informed of his arrest for an offense respecting his possession of the fruits of crime. The proof of these facts tended to prove the guilt of the accused, and the court properly refused to ignore them by sustaining the motion.

The defendant then testified in his own behalf that he bought of an unknown man in a gambling-house, the watch, chain, and key referred to, about half past eight o'clock in the evening of the day on which he was arrested. In order that his explanation may be fairly given, we quote fully from his testimony: "After I got up from the table, this man tapped me on the shoulder, and says: 'Partner, have you got a watch?' I said I did not have a watch, and he said: 'I have got a watch here that I will sell you cheap. I am broke, and want to get something to get out of town on.' I told him I didn't have much money with me, but asked him how much he would take for it. He said twenty dollars, and I told him I would not give that, but that I would give him fifteen. He said, 'All right,' and I paid him the money. He then said: 'I have got a couple of knives and keys here.' I told him I didn't want any keys, but asked him to let me see his knives. He pulled out the knives, and sold me one for four bits. . . . He told me I had better take the keys too, as I might hear of somebody looking for them, and could give them to them. I said, 'All right.'" In

reply to the question about the presence of persons when he purchased the goods, he said: "There was a lot of fellows, but I didn't know any of them." No other witness was offered for the defendant.

One of the grounds of the motion for a new trial is that the verdict of guilty is contrary to the evidence; that the possession of the property of Thomas is the sole fact which connects Sullivan with the perpetration of the robbery; that he was not identified as one of the robbers; and that his explanation of such possession is "probable and reasonable," and has not been shown to be false by the Territory. It is not necessary for us to review the evidence, and point out its sufficiency and effect. We are of the opinion that the verdict is upheld by the testimony which has been commented on, and that the jury, within their province, could legally discard the evidence of the appellant without the introduction of proof in rebuttal of his alleged purchase of the property.

Counsel insists that the court misdirected the jury in giving the following paragraph of an instruction: "The possession of goods recently stolen, or of which a person was recently robbed, is a circumstance to be considered by the jury in determining as to the guilt or innocence of the defendant. The possession, when unexplained, or not satisfactorily accounted for by a defendant, tends strongly to establish the guilt of a defendant found in possession of goods. . . ."

The power of the courts to give instructions to the jury in criminal cases has been restricted by the following statute: "The court shall decide all matters of law which may arise during the trial, but shall not charge the jury as to questions of fact." (Comp. Stats. third div. § 491.) This is the statement in legislative form of an ancient legal maxim which has been enacted in many statutes, and has been deemed so vital to the rights and liberties of the people that it has been engrafted upon the constitutions of States. While numerous authorities might be cited to illustrate the principle which has been proclaimed in this law, it will be sufficient to examine the decisions of the Supreme Court of California which are directly in point. In *People v. Mitchell*, 55 Cal. 236, it was adjudged error to instruct the jury that "proof of the possession of property in

the hands of defendant, recently after the same property was stolen out of the meat shop of Vestal, unless the possession of the same is satisfactorily accounted for by the defendant, raises a presumption of guilt against the defendant." In *People v. Ah Sing*, 59 Cal. 400, the opinion of the court is as follows: "The defendant was proceeded against by information, and convicted of the crime of burglary; and on the trial the court below instructed the jury that the possession of stolen property, supported by other circumstances and other evidence tending to show guilt, is a strong circumstance in the case. This was error. Whether the possession was strong evidence, or only slight evidence, tending to show guilt, was a matter for the jury to pass upon, and not a question for the court to determine." In *People v. Titherington*, 59 Cal. 598, wherein the appellant was convicted of burglary, a similar instruction was held erroneous, the court below having said that "such possession, if proven to the satisfaction of the jury, and unexplained by the defendant, supported by other circumstances tending to show guilt, is a strong circumstance tending to show guilt." In *People v. Cline*, 74 Cal. 575, it appeared that the defendant was convicted of grand larceny, and the following instruction was given to the jury: "The possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show guilt." The court affirmed the case of *People v. Ah Sing*, *supra*, and Chief Justice Searls, in the opinion, says: "In other words, it is not a question of law, upon which the court should instruct the jury, but one of fact, which is wholly within the province of the latter. In deducing the ultimate fact of guilt or innocence, they are the sole judges of the weight to be given to the probative fact of possession of property recently stolen, and of all the circumstances surrounding and stamping the character of such possession."

The deduction from these authorities is clear and positive, and we are compelled to hold that the court below usurped the functions of the jury in its instruction that the possession of stolen property, under the conditions which are specified, "tends strongly to establish the guilt of a defendant." Inasmuch as the case must be tried *de novo*, we have considered all the points which were presented by counsel, and will probably be passed

upon at the second trial. It is therefore ordered that the judgment be reversed, and that the cause be remanded for a new trial.

HARWOOD, J., concurred. DE WITT, J., did not participate in this decision.

STATE, APPELLANT, v. WILLIAMS, RESPONDENT.

CRIMINAL PLEADING — Negative matter — Rape — Pleading exceptions. — In an indictment for rape it is not necessary to allege that the female injured is not the wife of the defendant, as such negative matter is not an ingredient or constituent of the offense, but is in the nature of matter of defense.

Appeal from Third Judicial District, Custer County.

An objection by the defendant to the introduction of any testimony under the indictment was sustained by LIDDELL, J.

Henri J. Haskell, Attorney-General, for the State, Appellant.

James H. Garlock, for Respondent.

DE WITT, J. — The defendant was indicted in the District Court of Custer County, May 13, 1889, for the crime of rape. The charging portion of the indictment is as follows: "That E. J. Williams, with force and arms, in and upon one Mary Williams, then and there being a female child under the age of fifteen years, to wit, of the age of thirteen years, feloniously, violently, and unlawfully did make an assault, and her, the said Mary Williams, then and there feloniously did ravish, and carnally know, contrary to the form of the statute," etc. The law of the then Territory on which the indictment was found is, as far as relates to the question upon appeal, as follows: "Sec. 46. Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: (a) Where the female is under the age of fifteen years." (Comp. Stats. fourth div. § 46, p. 509.) "Sec. 47. The essential guilt of rape consists in the outrage to the person and feelings of the female." (Comp. Stats. fourth div. § 47, p. 510.)

On the trial, the defendant objected to the sufficiency of the

indictment, on the ground that it did not aver that the female was "not the wife of the perpetrator" of the alleged rape. The objection was by the court sustained, and the defendant discharged. The Territory reserved the question of law by exception, which appears in the record, and appealed to this court.

One question only is presented, viz., is it required that the indictment should contain the negative allegation, "not the wife of the perpetrator?" We have to determine whether the negative matter mentioned in the statute is of such character that it may be deemed an exception, and not necessarily to be pleaded, or whether it be an essential element of definition, requiring allegation and proof by the prosecutor.

The rules, as laid down by the authorities, are clear; but the application is sometimes attended with difficulty. (1 Bishop's Criminal Practice, § 385.) The rule is anciently stated as follows: "Where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave the adversary to show the proviso." (*Jones v. Axen*, 1 Raym. Ld. 119, cited in *United States v. Cook*, 17 Wall. 177.) And again: "If there be an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party." (*Commonw. v. Hart*, 11 Cush. 134. See, also, 1 Bishop's Criminal Practice, § 378.)

So many apparent exceptions to the rule have been made, and so many applications of the same that are in conflict with the exact letter, but not the spirit thereof, that the rule may be well stated, as in *Territory v. Burns*, 6 Mont. 74. "When an exception is stated in the statute, it is not necessary to negative such exception, unless it is a constituent part of the definition of the offense. The exception must be a constituent or ingredient of the offense declared by the statute, in order to require that it should be negatived by the indictment." It makes no difference in what part of the statute the exception may appear, whether in what is commonly called the "enacting clause," or not. The criterion which determines the necessity to negative

such exception is that it be a constituent or ingredient of the offense; in other words, that such exception is necessary to its complete definition. (See, also, *Territory v. Jaspar*, 7 Mont 1.)

In *Territory v. Burns*, *supra*, defendant was indicted for carrying concealed weapons. A separate section of the act defining the offense provided that the act should not apply to peace officers in the discharge of their official duties. It was held that the indictment need not plead the exception.

In *State v. Robey*, 8 Nev. 312, the question was presented whether an indictment charging an assault with a deadly weapon, with intent to inflict bodily injury, should contain the words "committed without considerable provocation," or "where the circumstances of the assault show an abandoned and malignant heart." It was held that these allegations were not essential to the indictment, although they are as thoroughly imbedded in the enacting clause as are the words which the defendant in the case at bar claims should have been found in the indictment against him.

In the case of *Commonw. v. Fogerty*, 8 Gray, 491; 69 Am. Dec. 264, the court says: "Nor was it necessary to allege that the prosecutrix was not the wife of defendant. Such an averment has never been deemed essential in indictments for rape, either in this country or in England. The precedents contain no such allegation." (See authorities cited in that case.) But in Massachusetts the allegation in question may be placed in the indictment, so that, if the proof of rape fails, a conviction can be sustained under the statutes of that State for fornication or adultery.

The statute of California upon rape, as charged in this indictment, is literally the same as that of Montana. In *People v. Estrada*, 53 Cal. 600, the indictment was for an assault with intent to commit rape. The court say that it is not necessary to allege that the assaulted person was not the wife of the defendant. This case, however, sheds no light upon the principle, as no reasons are given for the decision. It certainly appears that the negative matter in the statute under consideration is incorporated in the enacting clause. But as to the offense of rape, the weight of authority is that it need not be alleged in the indictment that the female is not the wife of the perpetrator.

In so holding, there seems to be a departure from the rules as to pleading negative averments. The reason for the apparent departure can only be upon the ground that the negative matter is not an ingredient or constituent of the crime. The essential element of the offense is the outrage to the person and feelings of the female, and not that it is committed against one female rather than another. The offense would exist in an act of sexual intercourse committed with any female, under any of the circumstances set forth in the subdivisions of section 46, with the exception, not of a class of females, but of a single individual, viz., the wife of the perpetrator. The authorities hold that this exception is in the nature of matter of defense; this, presumably, from the nature of the offense, and the exception. We shall therefore hold the indictment good.

The judgment of the lower court is reversed, and the case is remanded for further proceedings in accordance with the views herein expressed.

BLAKE, C. J., and HARWOOD, J., concur.

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9	300
11	273
11	274

9	182
16	254
17	350
17	556

LANDSMAN, RESPONDENT, v. THOMPSON, APPELLANT.

DAMAGES — *Conflicting testimony — New trial.* — In an action for damages sustained to a stock of goods, plaintiffs' witnesses placed the damages at from fifteen thousand to twenty-two thousand five hundred dollars. An expert called by the defendant placed them at from fifteen hundred to three thousand dollars, and the defendant who had casually looked through the store for five minutes, placed them at twenty-five dollars. The verdict was for one hundred dollars. The court below, on plaintiffs' motion, granted a new trial, on the ground that there was no evidence to sustain the verdict. *Held*, that the granting of a new trial, where there is a conflict in the testimony, is in the discretion of the trial judge, and will not be disturbed where there is such conflict and there is no abuse of discretion, but that the conflict must be substantial and not shadowy; and where the alleged conflict is utterly unsubstantial and trivial it must be considered that there was none, and the granting of a new trial was not an abuse of discretion on the part of the judge, although he was the successor of the judge who tried the case. (*Case of Chauvin v. Valiton*, 7 Mont. 584, affirmed.)

Appeal from First Judicial District, Lewis and Clarke County.

The action was tried before McCONNELL, C. J. Defendant appeals from an order by BLAKE, C. J., granting a motion for a new trial.

McConnell & Clayberg, for Appellant.

It is universally held that where there is a conflict in the evidence the verdict of the jury will not be disturbed; that it is for the jury and not for the court to pass upon the credibility of witnesses and to determine the weight to be given the evidence. (*Muskegon Nat. Bank v. N. W. Mut. Life Ins. Co.* 19 Fed. Rep. 405; *Stutsman v. Burlington & S. Ry. Co.* 53 Iowa, 761; *McCann v. Meehan*, 53 Wis. 541; *Price v. Buck*, 16 Neb. 108; *Scannell v. Strahle*, 9 Cal. 177; *Peteril v. Bugbee*, 24 Cal. 419; *Smith v. Williams*, 22 Ill. 357; *Pullman v. Ogle*, 27 Ill. 189; *Chicago & G. W. R. R. Co. v. Vosburgh*, 45 Ill. 311; *Edmister v. Garrison*, 18 Wis. 623; *Vandoran v. Armstrong*, 28 Wis. 236; *Douglass v. Tousey*, 2 Wend. 352; 20 Am. Dec. 616 and note; *Merrill v. Nightingale*, 39 Wis. 247; *Churchill v. Price*, 44 Wis. 546; *State Bank v. McGuire*, 14 Ark. 530; *Brooks v. Perry*, 23 Ark. 32; *Burlington & Co. v. Green*, 22 Iowa, 508; *Fowler v. Waldrip*, 10 Ga. 350; *Brooks v. Smith*, 21 Ga. 261; *Shanks v. Hayes*, 6 Ind. 59; *Hall v. Heneline*, 9 Ind. 256; *Newell v. Rusk*, 23 Ind. 210; *Patton v. Patton*, 5 Marsh. J. J. 389; *Wood v. Gibbs*, 35 Miss. 381; *Lisbon v. Bath*, 23 N. H. 1; *Easterly v. Cole*, 1 Barb. 235; *Clark v. Davis*, 7 Tex. 556; *Couch v. State*, 24 Tex. 557; *Mitchell v. Tolley*, 4 Kan. 177; *Pleak v. Chambers*, 7 Mon. B. 565; *Fulkerson v. Bowlinger*, 9 Mo. 938; *McDonald v. Edgerton*, 5 Barb. 560; *Dart v. Farmers' Bank*, 27 Barb. 337.) It will be remembered that this motion was considered and sustained upon the sole ground that the damages were insufficient, or that the evidence was insufficient to sustain such a verdict. In other words, upon the grounds that the jury exercised poor judgment in passing upon the credibility of the witnesses and weighing the testimony. It was not claimed that the jury violated any principle of law, or disregarded the instructions of the court, for this is one of those cases where there are no fixed rules to determine the amount of the damages, and in which the only criterion is the judgment of the jury. As the damages, therefore, were purely a question of fact, the court, by granting a new trial, took upon a power it had no right to assume. It in effect set up its judgment against the judgment of twelve men. (*Duberly v. Gunning*, 4 Durn. & E. 651.)

Upon the proposition that the court will not set aside a verdict founded on conflicting evidence, for the reason that it would have drawn a conclusion different from that of the jury, see *Davy v. Aetna Life Ins. Co.* 20 Fed. Rep. 494; *Lancaster v. Providence & S. S. S. R.* 26 Fed. Rep. 233; *Burton v. Philadelphia etc. R. R. Co.* 4 Har. (Del.) 452; *Scarritt v. Carruthers*, 29 Ill. 487; *Palmer v. Pourtsmouth*, 43 N. H. 265; *Adsit v. Wilson*, 7 How. Pr. 528; *Mackey v. New York etc. R. R. Co.* 27 Barb. 528; *Stoddard v. Long Island R. R. Co.* 5 Sand. 180; *Harris v. Halladay*, 5 Miss. 338; *Boyers v. Pratt*, 1 Humph. 90; Hayne on New Trials, p. 273 and note.

Where there is no legal measure of damages the court will not disturb the verdict, except for prejudice, passion, or corruption of the jury. (*Worcester v. Proprietors etc.* 16 Pick. 541; *Danville & Co. v. Stewart*, 2 Met. [Ky.] 119; *Buachard v. Booth*, 4 Wis. 67; *Sexton v. Brock*, 15 Ark. 345; *Wells v. Sawyer*, 21 Mo. 354; *Barnett v. Hicks*, 6 Tex. 352; *Payne v. Pacific M. S. S. Co.* 1 Cal. 33; *Aldrich v. Palmer*, 24 Cal. 516; *Chicago v. Smith*, 48 Ill. 107; *Waters v. Bristol*, 26 Conn. 398; *Terre Haute etc. R. R. Co. v. Vanneta*, 21 Ill. 188; 74 Am. Dec. 96; *Douglass v. Tousey*, 2 Wend. 352; 20 Am. Dec. 616; *Coleman v. Southwick*, 9 Johns. 45; 6 Am. Dec. 256; *Neal v. Lewis*, 2 Bay, 204; 1 Am. Dec. 640; *Coffin v. Coffin*, 4 Mass. 1; 3 Am. Dec. 189; *Merritt v. Harper*, 44 N. J. L. 73; *New Orleans etc. R. R. v. Hurst*, 36 Miss. 660; 74 Am. Dec. 785; *Berg v. Chicago, M. & St. P. R. R. Co.* 50 Wis. 419; *Delie v. Chicago & N. W. Ry. Co.* 51 Wis. 401; *Murray v. Wells*, 57 Iowa, 26.)

In this case the motion for a new trial was not granted by the judge who presided at the trial, but by the judge who succeeded him on the bench. The jury are the judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them. In determining upon the credibility of a witness and the force of his testimony the jury weigh in the balance of their judgments his character, his station in life, and above all his demeanor and appearance upon the stand. But take the very testimony of such a witness and place it upon paper, and a person who was not present at the time it was given is obliged to take it as he finds it and give it the same force that he does the evidence of one whom the jury believed,

because of their knowledge of his character and their knowledge of human nature they knew he was speaking the truth. Spoken evidence is too often belied by the character of the witness and the manner in which it is given to justify a person in judging of its weight merely from the words uttered.

Of course the court who presided at the trial has the same opportunity to pass upon the evidence as the jury, but a judge who did not hear the testimony given, and did not see the person who testified, but must draw his conclusions from the cold words as they appear in the statement upon motion for a new trial, is, we submit, wholly incompetent to determine upon the credibility to be given a witness and the weight to be given his testimony. (*Pashau v. Minn. St. Ry. Co.* 30 Fed. Rep. 649; *French v. Miller*, 2 Ohio St. 53.)

It is well established that the Supreme Court will control the ruling of the lower court in granting or refusing a new trial, where there has been an abuse of discretion. The discretion of the inferior court is a legal discretion and not an arbitrary one. (*Churchill v. Alpena Circuit Judge*, 56 Mich. 536; *Burlick v. Haggart*, Dak. Feb. 1885, 22 N. W. Rep. 589; *Jourdan v. Reed*, 1 Iowa, 135; *Rickner v. Dixon*, 2 Greene, 587; *Hill v. Wilkinson*, 4 Mo. 86; *Phelps v. Slack*, 10 Vern. 520; *President and Trustees of Brooklyn v. Patchen*, 8 Wend. 47; *Ensign v. Harney*, 15 Neb. 330; 48 Am. Rep. 344; *Anderson v. Cahill*, 65 Iowa, 252; *Wheeler v. Wallace*, 53 Mich. 355; *Scripps v. Reilly*, 35 Mich. 386; 24 Am. Rep. 575.)

Wade, Toole & Wallace, for Respondent.

Eleven witnesses, most of them disinterested, estimate the damages suffered by the respondent at from fifteen thousand to twenty-two thousand five hundred dollars. The only testimony in opposition to this was that of the appellant, who placed the damage at twenty-five dollars. The jury found a verdict in favor of the respondent in the sum of one hundred dollars. There is, in fact, no conflict in the testimony as to damages, for in view of the other evidence as to the amount of damages, the testimony of the appellant that twenty-five dollars would cover all of the damages sustained by respondents must

be taken as language of passion or prejudice, and worthy of no consideration. Such kind of testimony has not sufficient force to make a conflict. (Hayne on New Trial and Appeal, 865; *Blankman v. Vallejo*, 15 Cal. 645.)

The authorities cited by appellant are not applicable to the case in hand. It is apparent to the most casual consideration that a different rule should be applied to a case where a motion for a new trial has been denied by the trial judge, than to a case where a new trial has been granted by a judge who did not try the case. The reason why an appellate court will not disturb an order overruling a motion for a new trial, made by the trial judge, where there is substantial evidence to support the verdict, even though the verdict is apparently against the weight of evidence, is, that the trial judge has seen and heard the witnesses, and has had an opportunity to judge of their credibility and the weight to be given to their testimony. For this reason, the appellate court will not disturb an order overruling a motion for a new trial where there is substantial evidence to support the verdict, and there is no abuse of discretion by the trial judge. The same rule is applied by the appellate court where the trial judge grants the motion for a new trial. (*Chauvin v. Valiton*, 7 Mont. 581; *Treadway v. Wilder*, 9 Nev. 67; Hayne on New Trial and Appeal, 866.)

But this verdict was set aside, and a motion for a new trial granted by a judge who did not preside at the trial. He did not see or hear the witnesses. He looked upon the record and made his decision. In reviewing such a decision, there is nothing behind that the Supreme Court cannot see. The question is, did the judge, upon the testimony disclosed in the record, abuse his discretion in granting the motion for a new trial? To answer this question, the appellate court simply reviews the testimony as contained in the record.

There can be no abuse of discretion in granting a motion for a new trial, where, as in this case, there is no evidence to support the verdict, and where there is overwhelming and conclusive evidence against it.

DE WITT, J.—The complaint alleges that the plaintiffs were in possession of a building of defendant, which they were occupy-

ing as a store, in which they had a stock of goods of the value of thirty thousand dollars. They were tenants of defendant under a written lease. That, during said occupation, under the lease, defendant undertook some extensive repairs upon the building, involving a change in the front and the roof. It was, however, with plaintiffs' consent that the repairs were made. That in the prosecution of the repairs a portion of the roof and front were removed. That this was done so carelessly that, by reason of a severe storm of rain then occurring, the stock of goods were damaged to the amount of fifteen thousand dollars. The answer denies the negligence, and alleges due care in the prosecution of the repairs, and that there was no more damage to plaintiffs than was incident to the difficulties of the work; that the damage from the storm mentioned was not as much as one hundred dollars. The case was tried by a jury, and a verdict rendered for the plaintiffs for one hundred dollars. The plaintiffs gave notice of motion for a new trial, specifying several grounds therefor. On the hearing of the motion, however, it appears that the parties agreed that the instructions of the court were correct, and that there was no error of law in any particular. It was further agreed that the only question that should arise was the sufficiency of the damages, and that all other grounds for the motion should be, and were, specifically abandoned. Under these conditions, the assignment of error on which the motion was heard is as follows: "The verdict is unsustained by the evidence in this, to wit, that the jury have found that the plaintiffs were entitled to recover by reason of the negligence of the defendant, and the evidence being clear and unquestioned that the damages of the plaintiffs greatly exceeded the sum found, to wit, one hundred dollars, and that there was no evidence to justify the finding of one hundred dollars damages only by the jury; because, if the plaintiffs were entitled to any damages at all, the strong preponderance of the evidence clearly shows that they were entitled to damages greatly in excess of the sum found by the jury." The motion for new trial was heard and granted by a judge other than the one before whom the case was tried. The defendant appeals from the order granting the motion.

It becomes necessary to examine the evidence adduced on the

trial on the subject of damages. It appears that the value of the stock of goods was from twenty-five thousand to thirty thousand dollars before the damage occurred. The majority of the witnesses, in estimating the damages, figure by a percentage of the value. The plaintiffs, Landsman and Cohen, describe the catastrophe in detail. They each testify as to a long experience in the handling and dealing in such stocks. They were on the premises early in the morning of the day of the storm, the rain having come into the store in the night. They place the damage at from fifty to seventy-five per cent of the value. Then follows the testimony of eleven witnesses on the part of the plaintiffs, whom it is unnecessary to name. They were all persons engaged in, or having been engaged in, the business of handling stocks of goods similar to the stock of plaintiffs, for periods of time ranging from three to thirty-four years, with an average of about nine years. They respectively figure the damage to the goods from a minimum of fifty per cent to a maximum of seventy-five per cent of the value, with an average of at least sixty per cent. These witnesses were on the premises in the morning after the night of the disaster. None of them went through the whole stock, but they remained there from fifteen minutes to three hours, and took a general survey of the situation. On the question of damages the testimony of the defendant was as follows: The defendant in person testified: "Mr. Landsman asked me to go over to the store. Told me he had a big flood of rain over there, or something of that kind. I went over there; in fact, I did not expect anything else from the severity of the storm; and he referred to the fact of the damage to his goods, and the rain that had come down all through there, and I looked through the store, of course; and he said to me, 'I want you to get appraisers.' 'Well,' I said, 'I am sorry, Mr. Landsman, that this occurred, but it is one of those unaccountable things that I cannot help.' Then I told him I would not make any charge for this month's rent, in consideration of the damage that he had sustained. I allowed he sustained a damage may be of twenty-five dollars, but I concluded to give him a month's rent; and he says, 'No; you must get appraisers;' and I stepped out of his store. I have had considerable experience in handling dry goods and gents' furnish-

ing goods. I was in his store that morning about five minutes. From my observation there, I would state that the extent of the damage was about twenty-five dollars." J. W. Kinsely testified, for defendant, that he was an insurance adjuster. Had had twenty-two years' experience in adjusting losses on clothing and furnishing goods injured by water thrown on at fires. He testified fully as to his methods of adjusting, and the basis of computing losses, and fully qualified himself as an expert. It appears that a hypothetical question must have been propounded by counsel, to which the witness testified that he would estimate the loss and damage at from five to ten per cent of the value. It is observed, by the testimony, that plaintiffs' witnesses place the damages from fifteen thousand to twenty-two thousand five hundred dollars. The defendant's expert places it at from fifteen hundred to three thousand dollars. Defendant himself estimates it at twenty-five dollars. The verdict was for one hundred dollars. The only testimony that places the loss at below fifteen hundred dollars is the statement of defendant. He was in the building five minutes. Said he had expected a big flood of rain, or something of the kind, in Landsman's store, from the severity of the storm. He looked through the store, exchanged a few curt words, declined to participate in an appraisal of damages, and stepped out. Then he testifies that, in his judgment, the effect of a big flood of rain upon clothing and gentlemen's furnishing goods was to damage the same in the sum of twenty-five dollars. His testimony is about of the same character as if he had said, "The goods are not hurt twenty-five cents." From his whole testimony, it appears that his estimate of damages was more an ejaculation of contempt than an actual expression of his opinion.

Such is a *résumé* of the evidence upon the amount of damages. None of the other testimony is material to this inquiry. Upon this state of facts the court below granted the plaintiff and respondent a new trial. Such action is the alleged error. This court, in ruling upon an appeal from an order of the District Court granting a new trial, has said (BACH, J.): "There was much conflict in the testimony upon this point, and the granting of a motion for a new trial was within the discretion of the judge of the court below, when based upon this ground [that is,

a conflict in the evidence], and will not be disturbed where there is such conflict." (*Chauvin v. Valiton*, 7 Mont. 584.) We affirm the rule as there announced; and, if it appeared that there was much conflict in the evidence on the trial of the case at bar, we would on the authority of the above case, were it not for one other point discussed *infra*, affirm the order granting the motion, without further consideration. It should be affirmed, unless there were an abuse of discretion by the judge granting the motion. To determine whether there were such abuse, it is necessary to examine the evidence.

The rule above cited is based upon the ground that the judge below has heard the oral testimony, has observed the demeanor of witnesses, and had the benefit of living, speaking testimony, which in the Supreme Court is reduced to a lifeless printed record; for which reason it is presumed that the trial judge was in a better position to exercise a sound discretion than is the appellate court, and, if it does not appear that he has abused such discretion, his action will not be disturbed. In the case at bar the judge who granted the motion was other than the one who presided at the trial. The court has not, therefore, the benefit of the judgment of the trial judge, based upon his view of the animate witnesses. We occupy the same point of view as the judge passing upon the motion in this case, as far as the advantage of judging testimony is concerned. This court has, as the judge below had, nothing but printed testimony. Neither has any light save from the inanimate type, and to that we must refer to decide whether the judge abused a discretion. Counsel for appellant confront us with an array of authorities to the effect that, if there be a conflict in the evidence, the verdict of a jury will not be disturbed, and urges for that reason that it was error in the judge below to set aside the verdict. But that rule is, further, that such conflict, to avail for the purposes urged, must be a substantial, and not a shadowy, one. It is perfectly apparent that the judge below disregarded the evidence of the defendant Thompson as to the damages being twenty-five dollars, and that evidence only. With this evidence out, there was not a *scintilla* of evidence to sustain the verdict. This court will not usurp the province of the jury to pass upon the credibility of witnesses, and to determine the weight to be given to their evi-

dence; but, if an alleged conflict be utterly unsubstantial and trivial, it may be considered that there *was* none, and the setting aside of a verdict unsustained by evidence is not an abuse of discretion. "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief." (*Blankman v. Vallejo*, 15 Cal. 646.) We are of opinion that the judge below, when he disregarded the testimony of defendant personally as to damages, was not guilty of any abuse of discretion, and that the order granting the motion for a new trial should be sustained, and it is so ordered.

HARWOOD, J., concurs.

BLAKE, C. J., did not sit in the case or participate in the decision, having acted as judge in granting the motion for a new trial in the court below.

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9	191
17	350

KIRCHER APPELLANT, v. CONRAD ET AL., RESPONDENTS.

PRINCIPAL AND AGENT — Liability. — A principal is responsible for the acts of his agent when they have been done within the scope of his authority, and this liability will not be enlarged. (*Herbert v. King*, 1 Mont. 475; *Bank of Deer Lodge v. Hope Mining Co.* 8 Mont. 146; 35 Am. Rep. 458; *Bank of Billings v. Hall*, 8 Mont. 841, cited.)

EXPRESS WARRANTY — Form. — No form of words is essential to constitute an express warranty in the sale of chattels.

IMPLIED WARRANTY — Caveat emptor. — In sales of personal property on inspection, without express warranty, where the vendor's means of knowledge are no greater than those of the vendee, there is no implied warranty on the part of the vendor that the article sold is of the species contemplated by the parties, and the rule of *caveat emptor* applies.

WARRANTY — Words held not to constitute a warranty — Power of agent to warrant. — Plaintiff looked at some wheat in defendants' store, and asked what kind it was, stating that he wanted to buy spring wheat. Defendant and one T., a clerk, said they did not know, but would write and find out. Some months later, plaintiff went into the store and said to T., who was in charge of defendants' business: "How about that wheat, have you an answer yet?" T. said: "We have; it is spring wheat. We have just got a car load of it." Plaintiff said: "Are you sure it is spring wheat?" T. replied: "What do you take me for?" Held, that the words used by T. in reply to plaintiff's questions did not constitute a warranty that the grain was spring wheat. Held, also, that T. had the power under his employment to make an express warranty of the quality of the grain had plaintiff required it.

Appeal from Third Judicial District, Custer County.

The cause was tried before LIDDELL, J. Plaintiff appeals from an order of the court granting defendants' motion for a new trial.

J. W. Strevell, and *James H. Garlock*, for Appellant.

The agent, Tompkins, as is admitted by the defendants, and as is shown by the evidence, had full authority to make sales. His contracts of sale made in the course of that business were binding upon them. Where the acts of the agent will bind the principal, representations, declarations, and admissions respecting the subject-matter will also bind the principal if made at the time of the transaction. (Benjamin on Sales, § 624; 1 Greenleaf on Evidence, § 113; 11 Addison on Torts [Wood's ed.], § 1209; *Van Wyck v. Allen*, 69 N. Y. 61; 25 Am. Rep. 136; *Ahern v. Goodspeed*, 72 N. Y. 108; *Andrews v. Kneeland*, 6 Cowen, 354; *Flatt v. Osborne*, 33 Minn. 98; *Schuchardt v. Allen*, 1 Wall. 369; *Butler v. Maples*, 9 Wall. 766.) It is admitted in the pleadings that the defendants and their agent knew before and at the time they sold the wheat to the plaintiff that he was inquiring for spring wheat to be used for seed.

To constitute a warranty under such circumstances no precise form of words is necessary. It is sufficient that the agent of the defendants on finally making the sale represented to the plaintiff that the wheat *was* spring wheat. (Benjamin on Sales, §§ 613, 624; *Thorne v. McVeagh*, 75 Ill. 81.)

It is well settled that where the buyer goes to the vendor of an article seeking to purchase an article of a particular kind or quality for a particular purpose, and so informs the vendor, there is a warranty on the part of the vendor that the thing sold is of the kind, and is fit for the purpose for which the buyer requests it. (*Milburn v. Belloni*, 39 N. Y. 53; 100 Am. Dec. 403.) In this case the preponderance of the evidence was to the effect that the agent, Tompkins, by express words, represented to the plaintiff that the wheat was spring wheat, and the jury undoubtedly considered that there was an express, and not an implied warranty. It follows that the plaintiff is entitled to recover such damages as were the natural and necessary conse-

quence of the breach of the warranty. (*Passinger v. Thorburn*, 34 N. Y. 634; 90 Am. Dec. 753; *Van Wyck v. Allen*, 69 N. Y. 61; 25 Am. Rep. 136; *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13.) When the defendants put their clerk in the place of salesman in their store, they held him out to the public as having a right to say for them what kind of goods they were offering for sale, and they could not avoid or limit their responsibility for the presentation and warranty so made by showing that they had privately instructed him not to make the representation. (Mechem on Agency, §§ 279, 282; Benjamin on Sales, § 626; *Sandford v. Handy*, 23 Wend. 260.) Where the evidence is conflicting, the verdict of the jury should not be set aside and a new trial granted where there is no evidence to support the verdict. (*Kile v. Tubbs*, 32 Cal. 333; *Iburg v. Saunet*, 47 Cal. 265; *Kimball v. Gearhart*, 12 Cal. 27.)

George F. Shelton, and A. C. Botkin, for Respondents.

The grounds upon which the court granted the motion do not appear in the order, and an examination of the transcript shows that there was a conflict of testimony upon the issues in controversy. It would be sufficient to rest the case upon this proposition alone. (*Chauvin v. Valiton*, 7 Mont. 581.) The plaintiff, if he were to recover at all, must recover upon a specific warranty that the wheat in question was spring wheat and such as would grow. There was no warranty of the character or quality of the wheat in question by the defendants. If this was a sale by sample, then the only warranty that could be implied from the language used, was the warranty that the bulk corresponded with the sample. (Benjamin on Sales, § 650; *Carter v. Crick*, 4 Hurl. & N. 412; *Gachet v. Warren*, 72 Ala. 288.) There is no question in this case but that the bulk corresponded with the sample. The car load from which the wheat was taken was personally inspected and examined by the purchaser, and therefore no warranty of its quality or fitness for a particular use will be implied. (Benjamin on Sales, § 661, n. u; *Lord v. Grow*, 39 Pa. St. 88; 80 Am. Dec. 504; *Deming v. Foster*, 42 N. H. 165; *Shieler v. Baxter*, 109 Pa. St. 443; 58 Am. Rep. 738; *Lindley v. Hunt*, 22 Fed. Rep. 738; *Reynolds v. Palmer*, 21

Fed. Rep. 433, 439; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Moore v. McKinlay*, 5 Cal. 471; *Byrne v. Jansen*, 50 Cal. 624.)

If this transaction did not constitute a sale with warranty, as it manifestly did not, it was the sale of an article of a particular description, in which there is shown to be no greater or superior knowledge on the part of the defendants. The general rule is: When an article is sold upon an executory contract, like the one in question, that the delivery and acceptance of the article, after an examination, or an opportunity to examine, is a consent or agreement that the article corresponds with the contract and precludes a recovery for any difference which may exist. The vendee must immediately rescind and return, or offer to return, the goods. He cannot retain the property and afterwards claim damages by action or recoupment for inferior quality. Such a transaction differs from a sale with warranty in that the stipulated quality is a part of the contract itself and not collateral to it, and the rule of *caveat emptor* applies. (*Dutchess Co. v. Harding*, 49 N. Y. 321; *Reed v. Randall*, 29 N. Y. 368; 86 Am. Dec. 305; *Hargous v. Stone*, 5 N. Y. 73; *Dounce v. Dow*, 64 N. Y. 411; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *The Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515.) There is no evidence to show that the clerk who sold the wheat to plaintiff had any authority to warrant the quality or character of the same. An agent employed to sell has no implied power to warrant unless the sale is one that is usually attended with a warranty. (*Pickert v. Marston*, 68 Wis. 465; 60 Am. Rep. 877.) The burden of proving the authority of the agent rests upon the plaintiff. (*Upton v. Suffolk County Mills*, 11 Cush. 586; 59 Am. Dec. 163; *Smith v. Tracy*, 36 N. Y. 82; *Herring v. Skaggs*, 62 Ala. 180; 34 Am. Rep. 4.)

BLAKE, C. J.—This is an appeal from the order of the court below, in granting the motion of the respondents (who were the defendants in the action), for a new trial. The questions to be investigated may be readily understood by stating the substance of the pleadings.

The complaint alleges that the defendants were merchants in 1887, and that plaintiff purchased, through their “duly-author-

ized agents and clerks," eighty-one bushels of wheat, to be used by him in the spring of 1887 for seed; that he informed the agents of the defendants that he desired the wheat to be spring wheat for seed, to be sown that year; that defendants, by their agents, sold and delivered said wheat to plaintiff, and represented and warranted the same to be spring wheat, and fit to be used for sowing in the spring of 1887; that defendants charged plaintiff therefor eighty-five dollars, which plaintiff agreed to pay; that plaintiff believed the representation of the defendants, that said grain was spring wheat, to be true, and sowed the same in the spring of 1887; that said wheat was not spring, but winter, wheat, and therefore failed to produce any crop; and that plaintiff lost his entire crop of wheat for the season of 1887, and his labor in putting said seed into the ground, and was damaged in the sum of one thousand five hundred and eighty-five dollars.

The answer denies that plaintiff purchased any seed wheat, and alleges that he bought a quantity of wheat which was kept and sold as "chicken feed," and that plaintiff was informed of the character and quality thereof at the times alleged in the complaint; denies that the agents or clerks of the defendants represented or warranted to plaintiff that said wheat was spring wheat, and says that the clerks and agents of defendants told plaintiff that they did not know whether the grain was spring or winter wheat; denies that the agents or clerks of defendants made any representations to plaintiff by which plaintiff was misled or deceived as to the kind or character of said wheat; alleges that said clerks and agents told plaintiff, at the time and before he bought the wheat, that they did not know whether it was winter or spring wheat, and that defendants had bought and sold said wheat for feed, and no other purpose, and defendants could not warrant the wheat in any manner as suitable for seed; and denies that plaintiff was misled, or deceived, or damaged by any representations of the clerks or agents of defendants.

The replication denies the averments of the answer.

The testimony at the trial tended generally to prove the allegations of the respective parties in their pleadings, and was conflicting. The jury found for the appellant, who is the plaintiff in the action.

The transcript does not disclose the grounds upon which the motion for a new trial was granted, and which may have been errors in law, or the insufficiency of the evidence to justify the verdict. If they were founded upon the last, then, as the testimony is conflicting, we must follow the case of *Chaurin v. Valiton*, 7 Mont. 581, and affirm the order appealed from. In conformity with the best practice which has prevailed in this court, and in order to settle the law of the case upon another trial, we deem it necessary and proper to review the questions which have been submitted, and decide every subject of controversy.

It is admitted that the respondents were dealers in general merchandise at the times which are mentioned in the pleadings; that one Tompkins was employed by them as clerk and salesman, and was in charge of their business when the wheat was delivered to the appellant; that the grain was subject to the inspection of the appellant, who bought the same in the belief that it was suitable for seed in the spring of 1887; that no person can ascertain by inspection the difference between spring and winter wheat; that this grain was winter wheat; and that the appellant suffered damages through the total failure of his crop.

We shall assume, for the purposes of the discussion, that the testimony of the appellant is a narration of the facts, and can thereby distinguish some of the cases which have been cited by counsel as authority from that at bar. Kircher testified that, in the fall of 1886, he looked at some wheat in the store of the respondents, and asked what kind it was. Tompkins said he didn't know, and that he sold it for chicken feed. Kircher then said that if he knew it was spring wheat he would buy sixty or seventy bushels; and Tompkins replied: "If you want to buy that much, we can find out." Kircher said: "If you can do that, find out;" and Tompkins told him "he would write and find out." That Tompkins then took Kircher back to Flager, in his office. That Flager, one of the respondents, told Kircher "he would write and find out." That afterwards Flager told Kircher "he did not have an answer, but expected one in a short time." That at another time Flager said "he did not have an answer yet, but expected one every day." That in

March, 1887, Kircher went into the store, and said to Tompkins, who was then in charge of the business of the respondents: "How about that wheat? Have you an answer yet?" He said: "We have. It is spring wheat. We have just got a car load of it." Kircher said: "Are you sure it is spring wheat?" and Tompkins replied: "What do you take me for?" The appellant then bought the wheat, but did not receive any statement or memorandum in writing concerning the transaction.

Did Tompkins, under these circumstances, and by virtue of his employment, have the authority to make this warranty that the grain, which was purchased by the appellant, was spring wheat? This court has adopted the rule, which is not disputed, and has held that the principal is responsible for the acts of his agent when they have been done within the scope of his authority, and that this liability will not be enlarged. (*Herbert v. King*, 1 Mont. 475; *Bank of Deer Lodge v. Hope Mining Co.* 3 Mont. 146; 35 Am. Rep. 458; *Bank of Billings v. Hall*, 8 Mont. 341.)

The power of Tompkins is also defined in the following authorities: In *Upton v. Suffolk County Mills*, 11 Cush. 586; 59 Am. Dec. 163, Mr. Justice Metcalf says: "A general agent is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect. (3 Chit. Law of Com. & Man. 199.) When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner in which goods or things of that sort are sold. (Story on Agency, § 60. See, also, *Shaw v. Stone*, 1 Cush. 228.) The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured." Mr. Benjamin, in his treatise on Sales, says: "The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual." (Vol. 2 [3d Eng. ed.], § 945. See, also, *Pickert v. Marston*, 68 Wis. 465; 60 Am. Rep. 877; *Smith v. Tracy*, 36 N. Y. 79; *Palmer v. Hatch*, 46 Mo. 585; *Stewart v. Woodward*, 50 Vt. 78; 23 Am. Rep. 488; *McCormick v. Kelly*, 28 Minn. 135; 2 Addison on Contracts, 988.)

Many of the cases which are relied on by counsel to establish the right of Tompkins to warrant the quality of the wheat are inapplicable to the facts before us. The foregoing testimony of Kircher proves that the respondent Flager and Tompkins refused, upon several occasions, to express any opinion as to the character of the grain, except that it was chicken feed. In reply to the request of the appellant, Flager promised to write a letter and find out what he could upon this point. The conversation between Tompkins and Kircher, in which the words constituting the alleged warranty were used, was in logical effect a statement that an answer had been received by Flager, from some person who is not affected by these proceedings, conveying the information that the grain was spring wheat. Tompkins was not a party to this correspondence.

The complaint does not allege that Tompkins or the respondents have been guilty of fraudulent conduct, and the gist of the action is the warranty by the agents of the respondents that the grain referred to was spring wheat.

No form of words is essential to constitute an express warranty in the sale of chattels. There is no controversy relating to these principles.

Do the conditions which have been presented subject the appellant to the rule of *caveat emptor*? The case of *Lord v. Grow*, 39 Pa. St. 88; 80 Am. Dec. 504, is on all fours with that set forth in the pleadings of the appellant. A portion of the statement of facts is as follows: "On the 9th of April, 1859, the plaintiff went to the defendants, who are dealers in grain, for the purpose of purchasing some seed spring wheat for sowing. He asked F. P. Grow, one of the defendants, whether he had any good seed spring wheat. Mr. Grow answered in the affirmative. . . . The plaintiff took the wheat, which he and the miller thought was spring wheat (there being both kinds in the mill), and sowed it; but it proved to be winter wheat." Mr. Justice Strong, in the opinion, says: "We have here the bald question whether, in sales of personal property on inspection, without express warranty, the law presumes an engagement on the part of the vendor that the article sold is of the species contemplated by the parties. . . . The tendency of the modern cases has also been to the doctrine that, in sales of arti-

cles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wine by wine merchants, of jewels by a jeweler, and of medicines by a druggist. In this class of cases the buyer and the seller do not deal on equal terms. . . . The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale, nor the identity of the article, was defined by a bill of parcels, nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee. . . . To the purchaser of goods on inspection the language of the law is *caveat emptor*. There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that it is properly described by the name which the vendor gives to it."

The authorities hold that it is the duty of the buyer to make an inspection of goods, and the consequence of any omission so to do must be suffered by him. In *Barnard v. Kellogg*, 10 Wall. 383, Mr. Justice Davis says: "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interest, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because, if the purchaser distrusts his judgment, he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited." (See, also, *Reynolds v. Palmer*, 21 Fed. Rep. 433, note by Lawson, 439; *Lindley v. Hunt*, 22 Fed. Rep. 52; 1

Parsons on Contracts [5th ed.], 577; Story on Sales [4th ed.], §§ 349, 378; Biddle on Warranties, § 5; 2 Benjamin on Sales [6th Am. ed.], 843, n. 23.)

The case of *Lord v. Grow*, *supra*, is doubted by Mr. Biddle, in his work on Warranties, and the American editor of the work on Sales by Mr. Benjamin. (Biddle on Warranties, § 125; 2 Benjamin on Sales [6th Am. ed.], 843, n. 23.) But other text-writers have cited it with approval, and the same court has reiterated its doctrine in the recent case of *Shisler v. Baxter*, 109 Pa. St. 443; 58 Am. Rep. 738. It appeared that Shisler purchased of Baxter what both parties called "Wakefield cabbage" seeds, which cannot be distinguished by their appearance. After referring to *Lord v. Grow*, *supra*, Chief Justice Mercur says: "The vendee had just as much knowledge in regard to the kind and quality of the seed as they (the vendors) had. In such case, in the absence of express warranty, the exemption of liability of the vendor is too well settled to need any further citation of authorities." The application of these principles to the evidence of the appellant is sufficient to justify the court below in sustaining the motion for a new trial, and virtually disposes of the action, unless additional facts are shown.

While the form of the warranty is unimportant, the circumstances attending it must be critically examined. Professor Parsons expounds the law on this subject, and writes: "All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usage in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties; *provided, however*, that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. For these words of warranty are usually subjected to a careful, if not a precise and stringent, interpretation, as it is the fault of the buyer who asks for or receives a warranty if it does not cover as much ground and give him as effectual protection as he intended." (1 Parsons on Contracts [5th ed.], 576.) When the evidence of the appellant is subjected to this test, it is difficult to say that Tompkins made a warranty in any form which would be recognized by the courts. It was the duty of the

appellant to protect his interest by securing a bill of parcels which described in certain terms the wheat he purchased. The authorities hold that Tompkins had the power under his employment to execute this instrument, and thereby make an express warranty of the quality of the grain. The secret instructions of the respondents to their salesmen, which were not known by the appellant, cannot affect the transaction, and were properly excluded by the court below.

It is therefore adjudged that the order appealed from be affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

MING, RESPONDENT, v. FOOTE, APPELLANT.

9	201
28	106
28	110

PROBATE JUDGE AS TOWN-SITE TRUSTEE—*Ministerial or judicial officer*—*Town-site lots*.—An act of Congress provides for the transfer of the title to a town site to the probate judge of the county wherein such town may be situated, in trust for its occupants. Under the laws of the late Territory, passed to give effect thereto, such probate judge is charged with certain duties which involve the hearing and consideration of testimony concerning the rights of claimants to any lots, and passing upon its competency, credibility, and weight, and which also involve judicial trials before him in certain instances, wherein he is required to render judgments, from which appeals may be prosecuted to the Supreme Court of the Territory. *Held*, that the trust position of the probate judge in these matters is *quasi-judicial*. (*Ming v. Truett*, 1 Mont. 325, overruled; *Edwards v. Tracy*, 2 Mont. 49; *Schnepel v. Mellen*, 3 Mont. 118; *City of Helena v. Albertose*, 8 Mont. 499, reviewed and distinguished.)

SAME—*Judgment, when conclusive*.—The deed of a probate judge, of lots in the town site of which such judge is the trustee, is conclusive when brought to notice in a collateral proceeding, and is unassailable in the legal action of ejectment, where no equitable defense or cross-demand is set up.

EJECTMENT—*Deed from a probate judge*—*Presumption of regularity*.—Where a deed from a probate judge is relied upon for title in an action of ejectment, it is entitled to the presumption of regularity in its favor, as against the defendant claiming under an alleged deed from the same source of title issued fifteen years later, without affirmative proof of the preliminary steps conferring authority to make the grant.

DEED—*Consideration*.—The consideration upon the face of the deed is not conclusive.

SAME—*Execution*.—It is no objection to a deed from a probate judge that the grantor described himself in the deed as "N. Hilger, Probate Judge of Lewis and Clarke County, Montana Territory," and executed it, "N. Hilger, Probate Judge."

SAME—*Description*.—A description of lots in a town site, which has been officially platted and surveyed by the lot and block number, is a sufficient description of the *locus in quo*.

PLEADING—Allegations and proof.—Where the answer did not allege that the premises claimed by the defendant were located elsewhere than those described in the complaint, evidence offered by the defendant that the location of the lots described in the complaint was geographically different from the lots described by the same designation in the defendant's answer, was properly excluded.

Appeal from First Judicial District, Lewis and Clarke County.

The action was tried before BLAKE, C. J., without a jury.

Comly & Foote, for Appellant.

In ejectment, after pleading general issues, defendant need not set up title in himself. (*Bruck v. Tucker*, 42 Cal. 346.) It devolves upon one who depends for title upon a town-site trustee's deed, to show by affirmative proof that all of the prerequisites for obtaining or granting a deed have been complied with, especially in case where the deed does not show upon its face, or the records do not show, that the town-site laws, rules, and regulations made by the legislature, under authority of the laws of Congress, have been complied with. (*Edwards v. Tracy*, 2 Mont. 59; *City of Helena v. Albertose*, 8 Mont. 499.) Allegations of matters of evidence in a pleading are not issuable facts. If the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient defense. (*Moore v. Murdock*, 26 Cal. 524; *Racouillat v. Rene*, 32 Cal. 450.) In California, under their system of practice, a general denial is equivalent to the general issue. (*Brooks v. Chilton*, 6 Cal. 640; *Glazer v. Clift*, 10 Cal. 303; *White v. Moses*, 11 Cal. 69.) And under a general denial in an action of ejectment, the defendant has a right to introduce in evidence any facts which might show, or tend to show, that the plaintiff had no right to entry when the suit was brought. (*Kimball v. Gearhart*, 12 Cal. 50; *Bell v. Brown*, 22 Cal. 672; *Willson v. Cleveland*, 30 Cal. 201; *Marshall v. Shafter*, 32 Cal. 177; *Bell v. Bed Rock T. & M. Co.* 36 Cal. 219; *Semple v. Cook*, 50 Cal. 29; *Sparrow v. Rhoades*, 76 Cal. 208; 9 Am. St. Rep. 197.) The general issue under early practice was "not guilty." (*Kirkland v. Thompson*, 51 Pa. St. 216; *Gallagher v. McNutt*, 3 Serg. & R. 409; *Zeigler v. Fisher*, 3 Pa. St. 365; *Lee v. Slatterly*, 7 Baxt. 235.) And is held to be the only proper plea in *Bernard v. Elder*, 50 Miss. 336; *Tegarden v. Carpenter*, 36 Miss. 404; *Bratton v. Mitchell*, 5

Watts, 69. Under it all defenses may be given in evidence without special plea, except statute limitations, set-off, and matter in abatement. (*Poffenberger v. Blackstone*, 57 Ind. 288; *Dale v. Frisbie*, 59 Ind. 530; *Woodruff v. Garnor*, 20 Ind. 174; *Tracy v. Kelley*, 52 Ind. 535.) Under general issue any available defense may be given. (*Black v. Tricker*, 52 Pa. St. 436.) Under it, defendant, if not a mere trespasser or intruder, may show title out of plaintiff at time of commencement of action. (*Raynor v. Timerson*, 46 Barb. 518-526; *Gillet v. Stanley*, 1 Hill, 121; *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299; *Stephens v. Sinclair*, 1 Hill, 143; *Schauber v. Jackson*, 2 Wend. 13-48; *Styles v. Gray*, 10 Tex. 503; *Kinney v. Vinson*, 32 Tex. 125.) Under it, defendant may prove any facts tending to establish that plaintiff is not vested with title or right of possession. (*Wickes v. Smith*, 18 Kan. 508; *Hall's Heirs v. Dodge*, 18 Kan. 277; *Webster v. Bebinger*, 70 Ind. 9.) The plaintiff must recover on the strength of his own title. (*Root v. Beck*, 109 Ind. 472.) In ejectment, after a party has made proof of title to a tract of land, the question whether the tract includes the premises in controversy is purely one of fact, and any evidence tending to solve the question is admissible. (*Manly v. Gibson*, 13 Ill. 313.) In ejectment; where plea is "not guilty and not in possession," the question of boundary or identity is one of fact, and it is the peculiar province of jury to weigh the evidence. (*Tolman v. Race*, 36 Ill. 472.) Where the parties hold title by deeds which describe the lots by number, the recorded plat is necessarily referred to for the ascertainment of dimensions (boundaries). (*Francois v. Maloney*, 56 Ill. 401.) When plaintiff in ejectment sues for, and describes his land according to a survey or plat, and there is a dispute as to the boundaries, the original plat may be resorted to, and the lines as originally run will control. (*McCormick v. Huse*, 78 Ill. 363.) Whether the land as described in deed given in evidence is the same as that described in plaintiff's declaration or complaint, is a question of fact for the jury. (*Lawless v. Newman*, 5 Mo. 236; *Newman v. Lawless*, 6 Mo. 279.) Where parol evidence is resorted to to identify the calls of a survey, the facts must be found by the jury. (*Ott v. Soulard*, 9 Mo. 573.) What are the boundaries of a given piece of land is a question for the court.

Where these boundaries are is a question for the jury. (*Abbott v. Abbott*, 51 Me. 575; *Barclay v. Howell's Lessees*, 6 Peters, 498.) The burden of proof that land sued for is within the conformation under which plaintiff in ejectment claims is on the plaintiff. (*Papin v. Allen*, 33 Mo. 260.) And upon this question of identity parol evidence is always admissible. (*Wing v. Burgis*, 13 Me. 111; *Waterman v. Johnson*, 13 Pick. 261.) In order to locate a grant of lands upon the surface of the earth, there must be evidence to show that the place of location agrees with the description in the grant; and the effect of such evidence is a question for the jury. (*Pinkerton v. Ledoux*, 129 U. S. 346.) Possession and equitable title is sufficient defense in ejectment brought by holder of legal title. (*Meeker v. Dalton*, 75 Cal. 154.) Plat constitutes part of title. (*Cragin v. Powell*, 128 U. S. 691.) In reference to other questions arising in the case, we refer generally to *Schnepel v. Mellen*, *supra*; *Edwards v. Tracy*, *supra*; *Clark v. Titus*, Ariz. July 8, 1886, 11 Pac. Rep. 312; *Bingham v. City of Walla Walla*, 3 Wash. 68; *Stark v. Starr*, 6 Wall. 402; *Matter of Selby*, 6 Mich. 193; *Rathbone v. Sterling*, 25 Kan. 444; *Treadway v. Wilder*, 8 Nev. 92; *City of Helena v. Albertose*, 8 Mont. 499.

Carpenter, Buck & Hunt, for Respondent.

Appellant relies chiefly upon the case of *Edwards v. Tracy*, 2 Mont. 49, to sustain his objection to the admission of the deed from Probate Judge Hilger to John H. Ming and Charles K. Wells. Certain expressions are used in the opinion in that case which furnish a ground for the contention; but respondent contends that these expressions are *obiter dicta* and in no manner essential to that decision. Edwards, the plaintiff therein, in attempting to make out a case threw himself out of the court by showing the deed upon which he relied to be absolutely void; and here in this connection we call attention to the fact that the question of Edwards, in the case of *Edwards v. Tracy*, *supra*, and also that of Schnepel, in the case of *Schnepel v. Mellen*, 3 Mont. 118, which appellant also cites, are almost identical with that of the appellant in this action. The presumption should be in favor of the deed to Ming and Wells. (*Anderson v. Bartels*, 7 Colo.

256; *Chever v. Horner*, 11 Colo. 68; 7 Am. St. Rep. 217. See, also, *Kentfield v. Hayes*, 57 Cal. 410.) If it is once granted that the presumptions are in favor of this deed, then under the law, and especially so under the pleadings in this case, the judgment in favor of the plaintiff must stand. The recital of a consideration of only fifty dollars in the deed does not nullify it. The recital of a consideration is not conclusive of the actual amount delivered or paid. (*Paige v. Sherman*, 6 Gray, 511; *Miller v. Goodwin*, 8 Gray, 542; *Drury v. Tremont Imp. Co.* 13 Allen, 168; *Irvine v. McKeon*, 23 Cal. 475; *Rhine v. Ellen*, 36 Cal. 362.) This action is strictly legal. If the deed from Probate Judge Hilger was properly admitted the respondent showed a perfect right to the possession of the lots in dispute. (*Lammie v. Dodson*, 4 Mont. 560; *Kentfield v. Hayes*, 57 Cal. 410; *Murray v. Hobson*, 10 Colo. 66.) The appellant in this matter sets up no equitable defense, and consequently did not vary the strict legal character of the suit. (*Miller v. Fulton*, 47 Cal. 148; *Kentfield v. Hayes*, *supra*; *Murray v. Hobson*, *supra*; *Lestrade v. Barth*, 19 Cal. 671; *Davis v. Davis*, 26 Cal. 39; 85 Am. Dec. 157; *Clarke v. Huber*, 25 Cal. 598.) In order to constitute the defense of the appellant equitable, it should have been set forth with the same care and completeness that is required in an original bill in equity. (*Kentfield v. Hayes*, *supra*; *Lammie v. Dodson*, *supra*; *Miller v. Fulton*, *supra*; *Downer v. Smith*, 24 Cal. 124; *Blum v. Robertson*, 24 Cal. 126.) The District Court therefore did not err in confining the case to the strictly legal issues involved, and excluding the irrelevant testimony of the appellant. The appellant is in no position to contest the title of the respondent. He apparently relies upon two sources of title: *First*, upon a quit-claim deed from a man named Emueller, who himself admits that he abandoned whatever claim (and it was only possessory at best) he had to the land in dispute fifteen years before; *second*, on a deed from Probate Judge Clements to two men whom appellant instigated to fence the land in 1887. Emueller's title is hardly worthy of discussion. Can a man stand idly by for fifteen years, acquiescing in the possession and ownership by another of a tract of land to which he had once some possessory right, and then, because it has become valuable, attempt to re-assert his claim with any

shadow of reason or right? The deed from Probate Judge Clements was manifestly void. Probate Judge Hilger had already parted with the trustee's title, and no title remained in his possessor in office. (*Kentfield v. Hayes, supra; Murray v. Hobson, supra; Anderson v. Bartels, supra.*) The appellant stands before the court as a naked trespasser. (*Edwards v. Tracy, supra.*) The pleadings admit the identity of the lots claimed by appellant and those claimed by the respondent. (*Murray v. Hobson, supra.*) If the Wheaton plat of the town site of Helena is null and void, because no record appears of the survey and field notes on which it must have necessarily been based, then on appellant's theory of this case, there is no legal title to any lot in the original town site of Helena; not one has ever been acquired. The McIntyre plat and survey of the town site of Helena was made pursuant to a law of the legislature, passed for the sole purpose of curing defects in the original Wheaton survey of said town site. Even if the Wheaton plat, which has been used to designate lot subdivisions in the town site of Helena for twenty years, is a mere nullity, and the law of 1883 passed to validate it is void, still in this strictly legal action defendant, being in no position by his own pleading to take advantage of either one or the other nullity, must fail in his appeal. On the other hand, if this court holds that the Wheaton plat, defective though it is, from being unaccompanied by a record of its survey and field notes, is still a plat, a part compliance with the law, and therefore susceptible of being remedied by the Act of 1883, then also appellant has no equity or law in his favor. It has been the policy of this Territory, of Colorado, California, and Nevada, to discountenance and prevent men who have failed to avail themselves of the liberality of the United States, when opportunity was offered them of acquiring title to town lots, from standing by for years until such lots have enhanced in value, and then violently wresting them from the possession of their more far-seeing neighbors.

DE WITT, J.—This action is in the nature of ejectment. The respondent, as executrix of the estate of John H. Ming, deceased, seeks to recover from appellant lots 1, 2, and 3, in block 417, of the town site of the city of Helena, alleging title

in herself, and ouster by the appellant. Appellant's answer admits that he is in possession of the premises demanded, and alleges title in himself, which title he seeks to establish as hereinafter treated of. The action was tried before the court without a jury. Findings of fact and conclusions of law were made and filed by the court, and judgment thereon entered in favor of respondent for possession of the lots. A motion for a new trial, made by appellant, was denied. From that order and the judgment this appeal is prosecuted.

The facts, as we obtain them from the record, are as follows: In 1869, Helena was an unincorporated town in Lewis and Clarke County, Montana Territory. In that year Miers F. Truett, probate judge of that county, made due application to the United States for patent for the land on which the town was situated; and afterwards, June 15, 1872, the patent was duly issued by the United States to such probate judge, in trust for the inhabitants of the town, under the provisions of the act of Congress approved March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," and the acts amendatory and applicable thereto. The land in controversy is within said patent. On December 20, 1872, N. Hilger, then probate judge of said county, made, executed, and acknowledged a bargain and sale deed to John H. Ming and Charles K. Wells of lots 1, 2, and 3, in block 417, a portion of the town site of Helena, granted to the probate judge as above described, and which is the ground in controversy in this action. The grantor in that deed is described as "N. Hilger, Probate Judge of Lewis and Clarke County, Montana Territory;" and executes it as "N. Hilger, Probate Judge." The lots were described as bounded on the south by Eighth Avenue, on the north by lot 10, and on the east by Hoyt Street. Twelve other lots were included in the deed. The total consideration was fifty dollars. By mesne conveyances, the title so conveyed by the probate judge became and was vested in John H. Ming, by whom this action was commenced, prior to the initiation thereof. During the pendency of the case the original plaintiff died, and respondent, as executrix of his estate, was duly substituted, and the cause thus proceeded. A plat of the said Helena town site was prepared

by one A. C. Wheaton, by order of the probate judge, in 1868, and was accepted and approved January 7, 1869, by the board of commissioners of the county, and duly filed at the same time in the office of the county clerk and recorder. On the Wheaton plat are designated lots 1, 2, and 3, in block 417, bounded as above described. It does not appear that there were any field notes made or filed with the Wheaton plat. That in pursuance to the act of the legislative assembly of the Territory approved March 1, 1883, entitled "An act relating to the official survey of the town site of Helena," a plat and field notes of a survey of such town site were made by one McIntire, and accepted and approved on September 12, 1885, by the board of county commissioners, and on the same day filed in the office of the county clerk and recorder. That on said plat and in said field notes appear lots 1, 2, and 3, in block 417, bounded on the south by Eighth Avenue, on the north by lot 10 of said block, and on the east by Hoyt Street. On May 10, 1887, the appellant, George B. Foote, entered upon the land in controversy, claiming under a deed from Harry H. Thale and George Orth, and engaged in fencing it; and that before the fence was finished said John H. Ming was upon the premises claiming the same. That since said day said George B. Foote has been, and now is, in possession of the premises. That he at no time prior to May 10, 1887, made any improvements thereon. It does not appear that when Ming and Wells received their deed from Probate Judge Hilger that they were occupants or in actual possession of the lots, or made any proof to the probate judge of thier right to such possession or occupancy of the same. To almost all of this evidence objections were made by the appellant, the reasons for which we will review hereinafter in discussing the specifications of error.

In addition to the above facts, appellant offered to prove on the trial, and were precluded therefrom by the ruling of the court, the following facts: That lots 1, 2, and 3, in block 417, as the same are described in the Wheaton plat, would occupy a different portion of the surface of the earth than lots 1, 2, and 3, block 417, as described in the plat and field notes of the McIntire survey. Appellant offered in evidence a quit-claim deed from one Anton Emueller to himself, dated May 9, 1887,

acknowledged May 11, 1887, and recorded May 12, 1887, in which the ground purporting to be conveyed is described as lots 1, 2, and 3, block 417, of the town site of Helena; also a deed from Probate Judge Clements to Harry H. Thale and George Orth, dated May 10, 1887, recorded May 11, 1887, and a deed from said Thale and Orth to appellant Foote, dated May 10, 1887, and recorded May 11, in which deeds the premises purporting to be conveyed are described by lots and block, as above. Appellant then offered to prove by the then probate judge an application to purchase said lots by said Thale and Orth. The above evidence, so proffered by appellant, was heard by the court under objections, but was stricken out, and not considered. It was, however, in evidence that Emueller, mentioned above, had once a sort of transitory floating possession of the premises for placer mining purposes, and with a cabin, but not since the year 1873.

The District Court found the facts as above recited, and upon such findings, and upon the exclusion of appellant's proposed testimony, reached the following conclusions of law:—

1. The answer of the defendant does not allege that the premises claimed by the defendant are located elsewhere than the premises described in the complaint, and the pleadings relate to the same parcels of ground.

2. That the Wheaton plat was, from and after its approval in 1869 until 1885, the official plat of the said town site of Helena, under the laws of the United States and said Territory.

3. That the said McIntire plat and field notes of survey of said block 417, from and after the twelfth day of September, 1885, became and are the official survey of said block No. 417, and confirmed all the rights and interests of plaintiff therein, as shown by the conveyances of title to the plaintiffs and their predecessors in interest from the said probate judge of said county, and cured the alleged incompleteness and inaccuracy of the said Wheaton plat.

4. That the issuance of said deed by said Hilger, as the probate judge of said county, conveyed to said Ming and Wells the legal title to said lots 1, 2, and 3, in said block 417, and that the said J. M. Clements, the probate judge of said county, had no authority, as the said trustee of the said

town site of Helena, to issue said deed to the grantors of the defendant.

5. That the deeds issued to the said defendant by his grantors conveyed no title, right, or interest to the premises in controversy in this action.

6. That as between the parties to this action the defendant cannot question the validity of the acts of the probate judge of said county in conveying the property in controversy to said Ming and Wells.

7. That the defendant and his grantors had notice of the title of plaintiff, and the approving and filing of the said McIntire plat, about two years before the construction of the fence by the defendant.

8. That defendant, upon the tenth day of May, 1887, entered upon said premises, and has ever since held the possession thereof, without any right or title thereto.

9. That the plaintiff has suffered damage in the sum of one dollar.

The appellant, on motion for a new trial, made twenty specifications of error, which are now brought before us for review. They can, however, be much reduced in number, many of them depending upon one point. For instance, the first error urged which we will consider is the conclusion of the court below that Ming and Wells, so far as the purposes of this action and the position therein of the plaintiffs are concerned, acquired good title to the premises in controversy, by virtue of the deed from Probate Judge Hilger to them. Upon the decision of this point depends a large portion of appellant's position. This, determined in either way, disposes of the objection to the exclusion of the deed from Probate Judge Clements to Thale and Orth, the deeds from the latter to the appellant, the exclusion of evidence of occupancy by Thale and Orth, and their application to purchase from the probate judge, the exclusion of the deed from Emueller to Foote, and the admission of the chain of title from Ming and Wells to the respondent.

Again, the District Court found that the pleadings admitted that the premises demanded in the complaint and claimed in the answer were identical; in other words, that the matter of non-identity was not raised by the pleadings, but the contrary ad-

mitted. Upon the decision of this specification depends all of appellant's objections as to the exclusion of his proffered testimony that lots 1, 2, and 3, block 417, in the Wheaton survey, were entirely wanting in geographical coincidence with the same named lots in the McIntire survey. The errors thus complained of reduce themselves to few in number, which we will examine in order.

The principal error complained of by the defendant is the action of the court in admitting in evidence the deed from Probate Judge Hilger to Ming and Wells, which deed is the foundation of the respondent's title. Appellant objected to said deed because it does not show upon its face the authority by which the officer acted; because the consideration named in the deed is less than that required by law; because the deed does not show the trust capacity of the grantor; because the deed does not itself show, nor is it elsewhere in the evidence offered to be shown, that the grantees were the legal beneficiaries of the trust held by the probate judge; because the deed shows that it was obtained for speculative purposes (presumably by reason of the alleged inadequacy of the consideration); because its issuance was beyond the powers of the probate judge—for all which reasons the deed was void, and not voidable only.

The laws of the United States and the Territory, in reference to obtaining title from the government for town sites upon the public domain, so far as they are applicable to this case, are as follows: "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867 (14 U. S. Stats. at Large, 541), enacts, among other things, as follows: "That whenever any portion of the public lands of the United States have been or shall be settled upon or occupied as a town site, and therefore not subject to entry under the agricultural pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the County Court for the county in which such town may be situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the

proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated ; *provided, further*, that any act of said trustee, not made in conformity to the rules and regulations herein alluded to, shall be void."

The legislative assembly of the Territory of Montana passed laws to give effect to the above act. Such laws, as they were in force at the time of the deed from the probate judge to Ming and Wells, are compiled in the Laws of 1872. Codified Statutes, page 547, section 1, provides for the entry of the land occupied as a town, in the land office, by the corporate authorities of the town, or the probate judge of the county, in trust for the several use and benefit of the occupants of such land, according to their respective interests. Section 2 empowers the corporate authorities or the probate judge to perform the several acts and things necessary and appertaining to the entry of such land in the proper land office. Section 3 provides for the survey of such town site, which shall conform as near as may be to the existing rights and claims of the occupants. Section 4 designates what the plat and survey shall contain; and sections 5 and 6 are as follows: "Sec. 5. Immediately after such plat and survey have been filed, or if such survey and plat have been made previously to the entry, according to the provisions of section 3 of this act, then immediately after the entry of the lands at the proper land office, as provided in the first section of this act, the corporate authorities or the probate judge, as the case may be, shall cause a notice to be published in all the newspapers published in such town, or if no newspaper be published in such town, then by advertisement posted up in twelve of the most public places in such town for at least two months, giving notice of such entry, and requiring every claimant or claimants of any town lot or lots to file in the office of such corporate authorities or probate judge, as the case may be, a statement of his or their claim, within two months from the date of the first publication of such notice. Sec. 6. Such statement shall be made in writing, signed by the party or parties making the same, and verified by the affidavit of such party or parties, and shall be recorded at length in a well-bound book to be provided and kept for such purpose by such cor-

porate authorities or judge of probate, as the case may be. Such statement shall specify the ground of such claim, particularly describing the lot or lots claimed; the date, as near as may be, of the occupation of such lot or lots, and by whom; what improvements have been made on said lot or lots, and the value thereof; and that such lot or lots are now actually possessed and occupied by such claimant, or that the right to such occupation is in the claimant, if such lot or lots be occupied by another." The two preceding sections are originally found in the Act of December 12, 1867 (Laws 4th Sess. 61). Other sections follow, providing for the execution of said trust confided to the probate judge, and, among them, section 16: "The residue of lots (after conveying to actual occupants as aforesaid) in the possession of the corporate authorities or probate judge, as the case may be, and unclaimed after the expiration of sixty (60) days, it shall be the duty of the probate judge or corporate authorities, as the case may be, to post up notices, or cause the same to be done, in at least four public places in the county in which such town site is located, at least ten days before sale, that he will offer and sell at public sale all of, or so many as he may think proper of, the lots that may remain unclaimed at the time advertised; and that all lots, having been thus advertised and offered for sale, not bringing at least the minimum price, etc., shall be subject at any time thereafter to private entry at the minimum price." Originally Act January 6, 1870 (Laws 6th Sess. 67).

It is admitted by the record that the respondent, plaintiff in the action, did not prove what may be called the "jurisdictional facts" authorizing Probate Judge Hilger to make the deed to her predecessors, February 20, 1872; that is, she did not prove that the acts required by the statutes cited above as preliminary to and conditions of the issuance of such deed, had been performed. Appellant contends that the probate judge was a ministerial and not a judicial officer, and that consequently all acts by virtue of which came his authority to make the grant must be affirmatively proved by the party relying upon such grant, and cannot be presumed. Whether such probate judge were strictly a ministerial officer, or whether he were endowed with *quasi*-judicial functions of a limited nature, is, in the view we take of this case, a vital matter; and we will pursue the inves-

tigation with the ultimate solution of this proposition constantly in view. The appellant relies upon *Ming v. Truett*, 1 Mont. 325; *Edwards v. Tracy*, 2 Mont. 49; *Schnepel v. Mellen*, 3 Mont. 118; and *City of Helena v. Albertose*, 8 Mont. 499. We will review these cases.

In the first, the court (Knowles, J.) say: "The law conferring upon the probate judge the power to enter public lands upon which any town is located, and awarding to its citizens town lots under the provisions of law, does not purport to confer upon him any judicial powers. The power is conferred upon him, and not upon his court. He is simply designated as the trustee for the benefit of the citizens of the town. His duties in allowing entries of lots are prescribed by law, and he acts in a ministerial capacity." True, the "law conferring upon him the power to *enter public lands*" does not give him judicial authority. The law referred to is the law of Congress authorizing the grant to the probate judge. It is not objected by appellant that respondent failed to prove the successive and necessary steps to be taken by the probate judge to obtain patent from the United States, and, in fact, these steps were proved on the trial. But the same act of Congress creating the trust in the probate judge provides that the execution of such trust shall be in accordance with rules and regulations to be prescribed by the legislative authority of the Territory; and when the case of *Ming v. Truett* was tried in the District Court, and heard in the Supreme Court, the legislature of Montana had provided for the execution of such trust, among other things, as follows: "In all cases where there is a dispute or contest in regard to the right to the deed to any lot or lots, the probate judge . . . shall hear the testimony relating thereto; and, after two days' notice of such time and place of hearing given to each and every contestant, he shall proceed to hear and decide such claims in accordance with the principles of right and justice, and the provisions of this act; . . . *provided*, the . . . judge may adjourn from time to time, as he may deem just for the fair *adjudication* of said claim or claims." (§ 11, Act Dec. 12, 1867, Laws 4th Sess. 62.) Section 12 of the same act goes on to provide fully for an appeal to the District Court by any person feeling aggrieved by "*such decision*;" and provides

further: "And in all cases the pleadings and proceedings thereafter shall be governed by the same rules applicable to actions originally commenced in the District Court."

Therefore, although the act of Congress conferred no judicial functions upon the probate judge, as held in *Ming v. Truett, supra*, the act of the legislative assembly of the Territory, passed for the purpose of giving effect to the act of Congress, and carrying out the grant for the benefit of the inhabitants, defines the position and character of the probate judge in terms which would be peculiarly misapplied to a strictly ministerial officer. Our views as to the judicial or ministerial character of the probate judge, as to the subject-matter, will be fully developed later in this opinion.

Passing to the case of *Edwards v. Tracy, supra*, we find a contest between two claimants of a town lot in the town of Bozeman. The plaintiff Edwards claimed by virtue of a deed from the probate judge dated about July 1, 1870. He voluntarily, and without objection by the defendant, offered in evidence an application made by him to the probate judge, for the purchase of the lot, which application says: "That said lot is vacant and unclaimed by any other party; that the improvements upon said lot consist of ———, of the value of ——— dollars; that the value of said lot is about one hundred dollars; that the same is now occupied by ———; that the right to the possession and occupation is in the said Thos. R. Edwards." The deed, which was made in pursuance to this application, was offered in evidence, and admitted; for which action of the court the defendant assigned error, which assignment was by the Supreme Court sustained. It will be observed that the applicant therein based his claim to a deed from the probate judge upon his alleged *right to the possession and occupation* of the lot, and not upon an actual possession and occupation; and he states his reason for his alleged *right to possession*, viz., that "no one else occupies the same, and that it is vacant." He thus deliberately, by his own affirmative testimony, in introducing the application to purchase, confessed himself out of court; and the court (Knowles, J.) properly say: "The claim to enter a lot by one out of possession, or *without the right to the possession*, does not come within the purview of this section [referring to § 6, above cited]. The appli-

cant in this case bases his right to the possession upon the fact that no one else occupies the same, and that it is vacant. These give no such right. There was no right vested in the trustee, who was in this case Noble [probate judge], to make a conveyance of a lot upon such an application as the one presented by the plaintiff in the case." The opinion up to this point is sufficient to sustain the decision of the Supreme Court. What was afterwards said by the learned judge is *obiter dicta*, and we do not feel that, in the case at bar, we are controlled thereby, although he did practically say, in that case, *obiter*, that a plaintiff in ejectment, relying upon such probate judge's deed, must affirmatively prove all facts giving such grantor authority to make the conveyance.

The case of *Schnepel v. Mellen*, *supra*, was a contest between rival claimants to a deed from the probate judge, a contest originally heard and determined by the probate judge, and thence appealed, through the District Court, to the Supreme Court. The action assumed the nature of one to quiet title. It was tried upon an agreed statement of facts. The question was not raised as to whether a party in ejectment, holding a probate judge's deed, and thereon relying, must prove the authority of his grantor to make the deed. The matter before the court was the construction of the acts of the respective claimants, as those acts were presented to the probate judge, and as to which claimant was entitled to the deed from the probate judge, by virtue of the facts. The point under discussion in the case at bar was not involved in *Schnepel v. Mellen*. In that case the defendant exhibited in evidence the facts constituting his alleged possession as a foundation for his alleged right to a deed. Those facts were digging some post holes in the night without the knowledge of any one save himself, and the court held that the alleged possession of the defendant was not of that open, actual, and unequivocal character which entitled him to enter the lot, as against an eight years' uninterrupted possession by the plaintiff, his adverse claimant to the premises.

In *City of Helena v. Albertose*, *supra*, the court (Bach, J.) say: "When the probate judge undertook to establish by that map [the town-site map] a street over lands actually occupied by individuals as a residence when the entry was made by the

probate judge, his act was in conflict, . . . and the public had no right as against such an occupant." The court elsewhere in that opinion says: "Neither the laws of this Territory, nor the act of the probate judge, could deprive any person of the land occupied by him at the time when the probate judge made the entry of the town site, and give such land to one who was not an occupant thereof." With these views we concur. The appellant seems to rely upon this case to sustain some rights claimed to be acquired by virtue of the ancient, transitory, placer mining possession of Emueller, a possession which ceased in 1873, was always of a floating character, without any certain local habitation, and which was sought to be resurrected in 1887, by the deed from him to Foote. It does not appear that Emueller ever made any application to purchase the premises from the probate judge, but that he abandoned all possession and claim thereto for fourteen years. This matter we dispose of later; but, in passing, *quære*, had he not forfeited all claim by his laches? (Comp. Stats. § 2017, div. 5.)

We have reviewed the former utterances of this court upon the matters urged in appellant's first specification of error, because he has zealously pressed these four cases upon our consideration, and because there is contained in them some *dicta*, and in *Ming v. Truett*, a decision which is in conflict with the conclusion we have reached as to the alleged error of the lower court in holding that the deed of Probate Judge Hilger to Ming and Wells conveyed title to those grantees, as far as the purposes of this action, and the position of defendant therein, are concerned. We will say, however, before going into that matter, that the plaintiff did not, in the case at bar, voluntarily put herself out of court by showing, in her own affirmative testimony, that she had no right whatever to the premises, as did the plaintiff in *Edwards v. Tracy* and the defendant in *Schnepel v. Mellen*. As to the nature of the functions of the probate judge, in the execution of a town-site trust, the Supreme Court of Colorado (Beck, C. J.) says: "The government, instead of issuing patents to the several claimants, and instead of granting the tract to the territorial organization, transferred the title of the entire tract to the judge of the Probate Court of Arapahoe County, in trust for the parties entitled to conveyances. By the terms of the

grant the probate judge was the officer and representative of both the federal and the territorial governments in the disposal of these lands. He was invested with functions analogous and similar in character to those of the land department of the general government, or of the officers of a State, charged with the same class of duties. His duties involved the hearing and consideration of testimony concerning the rights of claimants, and passing upon its competency, credibility, and weight. It also involved judicial trials before him, in certain instances, wherein he was required to render judgments, from which appeals might be prosecuted to the Supreme Court of the Territory." (*Anderson v. Bartels*, 7 Colo. 265.) This language might have as appropriately been written of the character of the probate judge of Montana, under the provisions of sections 11 and 12, Laws Fourth Session, 62, *supra*.

We believe that the correct and logical construction of the trust position of the probate judge in these matters is that it is *quasi-judicial* in its character. It was so recognized by this court in *Schnepel v. Mellen*, *supra*, in which case this court heard an appeal from an adjudication originally made by the probate judge under the town-site laws. If the probate judge originally had no jurisdiction, the Supreme Court had none. The term "jurisdiction" suggests the idea of a judicial tribunal in which it is to be exercised. It is not material whether the judicial function be deemed to reside in the probate judge individually, or in him as the Probate Court of the Territory. The probate judge "must hear the testimony." "He must give notice of the hearing to each and every contestant." "He shall hear and decide in accordance with the principles of right and justice." "His action is called an 'adjudication.'" "An appeal to the District Court is provided for." "The pleadings and proceedings shall be governed by the same rules applicable to actions originally commenced in the District Court." These are the expressions in the last-cited act, *supra*. They all point irresistibly to the intent to invest the probate judge with *quasi-judicial* functions, as to a limited subject-matter. This conclusion, arrived at, brings promptly to our aid the rule of law that the judgment of a special judicial tribunal, with jurisdiction to hear and determine questions of fact presented to it, such as the

United States land office, is conclusive, when brought to notice in a collateral proceeding.

Mr. Chief Justice Marshall, early in the history of the Supreme Court of the United States, in speaking of acts of the land office of the State of North Carolina, said in the case of *Polk's Lessee v. Wendal*, 9 Cranch, 87: "The law for the sale of public lands provides many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the State from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. The rules are, in general, directory; and, when all the proceedings are completed by a patent issued by the authority of the State, a compliance with these rules is presupposed. That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would therefore be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent." In *Smelting Co. v. Kemp*, 104 U. S. 640, the same court (Field, J.) says: "In the course of their duty the officers of that department [the land department] are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment, as to matters of fact properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is

intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

We cite these cases, not so much to illustrate the rule laid down, which is familiar as a household word, as to make manifest the reason on which the rule rests, a reason which logically results in our conclusion that the probate judge, under the territorial laws, was invested with the judicial powers, as above indicated. Therefore, when a deed from him is relied upon for title in an action of ejectment, it is entitled to the presumptions of regularity in its favor, as against a defendant such as the appellant herein, claiming under an alleged deed from the same common source of title, issued fifteen years later, without requiring from the elder grantee affirmative proof of the preliminary steps conferring authority to make the grant.

But the appellant urges that he is within an exception to the rule. He cites the portion of the law "that any act of said trustee [probate judge], not made in conformity to the rules and regulations herein alluded to, shall be void." We recur again to the opinion of Chief Justice Marshall, *supra*: "But there are some things so essential to the validity of the contract that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined." The opinion then goes on to state how and why such investigation should be in a court of equity, and concludes: "In general, then, a court of equity is the more eligible tribunal for these questions, and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or *where the officer had no authority to issue the grant.*" The italics are ours. Upon this exception appellant rests. The case of *Polk's Lessee v. Wendal* was exhaustively reviewed in the opinion of Mr. Justice Field, cited *supra* (*Smelting Co. v. Kemp*), and this exception there treated by him as follows: "So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification that when the authority depends upon the existence

of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision." (See, also, cases there cited.) This last utterance concludes us, in our opinion. The authority of the probate judge did depend upon the existence of certain facts. It was his duty to ascertain whether these facts existed. His determination is evidenced by his deed, and the same is conclusive against collateral attack. (*Smith v. Pipe*, 3 Colo. 187.) It was therefore not error to admit in evidence the deed from Probate Judge Hilger to Ming and Wells, and the District Court correctly found that said deed vested a legal title, which had come by mesne conveyances to the plaintiff, good as against the defendant, for the purposes of this action of ejectment. (See, also, *Sherry v. Sampson*, 11 Kan. 611.)

That the consideration named on the face of the deed is less than the legal one is not material. The consideration upon the face of a deed is not conclusive. (*Polk's Lessee v. Wendal*, *supra*.)

The objection that the deed was not made by N. Hilger as probate judge is not well founded. He described himself in the deed as "N. Hilger, Probate Judge of Lewis and Clarke County, Montana Territory," and executed it, "N. Hilger, Probate Judge." (See *Smith v. Pipe*, 3 Colo. 187.)

Our conclusion above reached, as we have hereinbefore intimated, disposes of the major part of appellant's assignments of error. It also disposes of the objection to the original town-site plat, the Wheaton plat. That plat was incomplete, in the absence of its field notes; but it amply appears from the evidence that it was the official plat, and the only official plat, of the town site, from its due approval and filing, in 1869, until it was superseded by the McIntire plat in 1885. It appears that the deed in question was made by it, as were all deeds in the town site for a period of seventeen years. If the plat were insufficient and incomplete, there would seem to be here an opportunity for the application of the maxim, *communis error facit jus*.

The testimony proffered by appellant, that the portion of the

earth's surface indicated in the Wheaton plat as lots 1, 2, and 3, in block 417, is geographically different from the premises described by the same designation in the McIntire plat, was properly excluded, as the pleadings admit that the ground demanded by plaintiff, and claimed and held by the defendant, is the same. The answer does not allege that the premises claimed by defendant are located elsewhere than those described by the complaint. A description of lots in a town site which has been officially platted and surveyed by the number of lots and block is a sufficient description of the *locus in quo*. (2 Devlin on Deeds, § 1020, n. 2.) If we be correct in the conclusion expressed, then the deed from Probate Judge Clements to Foote's predecessors, May 10, 1887, was a nullity, the predecessor of the grantor having years before parted with the whole title, and that deed was properly excluded. The deed from Emueller to Foote, May 10, 1887, and the evidence of Emueller's floating and abandoned possession fourteen to sixteen years prior to said deed, shares the same fate. This disposes of the errors as specified.

Be it understood that we do not hold that the deed from Probate Judge Hilger to Ming and Wells is above or beyond attack, but that such attack must be made in an equitable action for that purpose, and not in the law action of ejectment. We draw once more from the wealth of learning in *Polk's Lessee v. Wendal, supra*: "On an ejectment, the pleadings give no notice of those latent defects of which the party means to avail himself; and, should he be allowed to use them, the holder of the elder grant might often be surprised. But in equity the specific points must be brought into view; the various circumstances connected with those points are considered; and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation, and the decision of a court in the last resort upon them is decisive. The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant." The defendant below did not set up an equitable defense in the nature of a cross-complaint, nor did he change the strict legal character of the action. We may take his own expressive, if not altogether elegant, language used on the

argument, and let him abide by the position as he announces it; that "the action is a square-toed one of ejectment." If he desired to avail himself of the equitable defense suggested, he should have set up the same in his answer with as much detail as if it were an original bill in equity. (*Lestrade v. Barth*, 19 Cal. 671; *Davis v. Davis*, 26 Cal. 39; 85 Am. Dec. 157, and cases there cited; *Miller v. Fulton*, 47 Cal. 146; *Kentfield v. Hayes*, 57 Cal. 410; *Lamme v. Dodson*, 4 Mont. 560.) Not having done so, the judgment of the lower court is correct, and that judgment and the order denying a new trial are each affirmed.

HARWOOD, J., concurs. BLAKE, C. J., did not sit in the case, or participate in the decision, for the reason that he had acted as judge on the trial of the case below.

STATE EX REL. THOMPSON v. KENNEY, AUDITOR.

MANDAMUS—Hearing of the application—Pleadings.—Under section 575 of the Code of Civil Procedure, relating to writs of mandate, it is no ground for the refusal of a writ of mandate that certain specific facts alleged in the respondent's answer were not denied in the relator's replication, where the pleadings raised questions of law only, and where relator relied upon the facts alleged in his affidavit, and expressly admitted by respondent's answer, as ground for the relief which he prayed for.

MANDAMUS TO STATE AUDITOR—Claims against the State.—In an action for a writ of mandate brought by relator, a member of the legislative assembly, against the auditor of the State, to require him to audit and settle relator's claim against the State for his compensation and mileage as a member of the House of Representatives, and to issue him a certificate therefor, as provided in section 121, fifth division of the Compiled Statutes, where it was alleged in respondent's answer that another person held a certificate of election to the same office which relator claimed to be occupying, and it did not appear that a contest of the election of relator was pending in the house of which he claimed to be a member. *Held*, that upon sufficient *prima facie* evidence of relator's membership of the House of Representatives of this State he would be entitled to the relief asked for.

ELECTIONS—Constitutional law—Certificate of election—Canvassing board.—The act of Congress, approved February 2, 1889, enabling the people of Montana and other Territories to form and adopt State governments, provides in section 8 that: ". . . . At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitution. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same" Section 9 provides: ". . . . and until said State officers are elected and qualified under the provisions of each constitution, and the States, respectively, are admitted into the Union, the territorial officers shall continue to discharge the duties of their respective offices in each

9	223
9	374

9	223
13	28
13	329
23*	733
31*	881
34*	304

9	223
14	479
23*	733
37*	8

of said Territories." Section 24 provides: "That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures . . . and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified, or changed by this act or by the constitutions of the States, respectively." Section 25 provides: "That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed." Section xx., "Schedule," section 1, of the State constitution, provides that: "All laws enacted by the legislative assembly of the Territory of Montana, and in force at the time the State shall be admitted into the Union, and not inconsistent with this constitution or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the State until altered or repealed, or until they expire by their own limitation." The fifth paragraph of ordinance II., referred to in section 17 of the "Schedule," and adopted with the constitution, requires that the returns of said elections for the adoption or rejection of the constitution "shall be made to the secretary of the Territory, who, with the governor and the chief justice of the Territory, or any two of them, shall constitute a board of canvassers, who shall meet . . . and canvass the votes so cast, and declare the result." The eighth paragraph of the same ordinance provides that the votes for all State officers, members of the legislative assembly, and district judges, shall be returned and canvassed "in the same manner and by the same board as is the vote upon the constitution." A statute of the Territory, existing prior to the enabling act and prior to the adoption of the constitution, provided that the canvass of the votes cast for members of the legislative assembly should be made by the boards of county commissioners of the respective counties in the Territory, and certificates of election issued by the clerk of the board of county commissioners. *Held*, that this statute was in conflict with the said act of Congress and the constitution of the State and did not remain in force after the adoption thereof. *Held, also*, that the board of canvassers provided for in the fifth paragraph of ordinance II., was the legally constituted canvassing board to canvass the votes for members of the legislative assembly and to declare the result. *Held, also*, that a certificate of election issued by said board of canvassers was *prima facie* evidence of relator's membership in the House of Representatives of this State.

ORDINANCE—Force and effect as constitutional provision.—An ordinance, framed and adopted by the constitutional convention, and appended to the constitution, and with it adopted by the people, has the same force and effect as a constitutional provision.

SAME—Effect upon statute.—The effect of an ordinance upon the statute is to change and modify its provisions so far as it is necessary to give the provisions of the ordinance full scope and effect.

STATUTORY CONSTRUCTION—Duty of auditor.—The compensation of members of the legislative assembly is fixed by law (Const. art. v. § 5) and the duty of the State auditor as defined by section 121, fifth division of the Compiled Statutes, is therefore not affected by the provisions of section 20, article vii. of the Constitution, creating a board of examiners, and providing that "no claims against the State, except salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board."

Original proceeding. Application for writ of mandamus.

E. D. Weed, McCutcheon & McIntyre, and S. A. Balliet, for relator.

The right to mandamus in the case presented is unquestioned. (*Fowler v. Peirce*, 2 Cal. 165; *State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 190.) If relator is entitled to compensation for services as claimed, the amount is fixed by law, and the auditor does not exercise judicial functions in auditing it. (Comp. Laws, p. 625, § 121; *Fowler v. Peirce*, *supra*; Const. art. v. § 5.) The constitutional convention was authorized by act of Congress, approved February 22, 1890, "to form State governments." (Sess. Laws, 16th Sess. § 4, p. 64.) It was also empowered to "provide for election of officers including legislative." (Sess. Laws, 16th Sess. § 24, p. 73.)

The act further provided "that all laws in force made by the Territory at the time of admission should be in force as laws of the State, except as modified and changed by this act or by the constitution. (Sess. Laws, 16th Sess. § 24, p. 73.) Prior to the adoption of the constitution, the county commissioners were the final canvassing board, so far as the election of members of the legislature was concerned, and hence the certificate mentioned in sections 1033 and 1325, fifth division, Compiled Statutes, emanated from that board, and was issued by the clerk thereof. (Comp. Stats. § 1033, p. 930.) The ordinance adopted by the constitutional convention changed this and made the governor, chief justice, and secretary of the Territory such final canvassing board, with power to declare the result. (Subds. 5, 8, Ordinance.) The house is judge of the election returns and qualifications of its members. (Const. art. v. § 9.) Its action under this provision of the constitution is judicial and final. (*People v. Mahaney*, 13 Mich. 491; *Flint & F. P. R. Co. v. Woodhull*, 25 Mich. 99; 12 Am. Rep. 233; *Illinois Cent. R. R. v. Wren*, 43 Ill. 77; *Bedard v. Hall*, 44 Ill. 91; *Grob v. Cushman*, 45 Ill. 119; *Rockford R. R. Co. v. Lynch*, 67 Ill. 149; Cooley's Constitutional Limitations [5th ed.], n. 1, p. 159.) It is the right and duty of the court to take judicial notice of the journal of the legislature. (*People v. Mahaney*, *supra*.) In all cases of this kind the law is "that where there has been an authorized election for the office in controversy, the certificate of election which is sanctioned by law or usage is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law." (*Kerr v. Trego*, 47 Pa. St. 292.

See discussion in *Re Sykes*, and especially argument of Senator Saulsbury, 2 Cong. Rec. pt. 5, 43d Cong. 1st Sess. p. 4325, et seq.; Argument Senator Morton, 2 Cong. Rec. pt. 5, 43d Cong. 1st Sess. p. 4287, et seq.; Argument Senator Hamilton, 2 Cong. Rec. pt. 6, p. 323.)

Henri J. Haskell, Attorney-General, for the State, Respondent.

HARWOOD, J.—This action was commenced in this court on the seventeenth day of January, A. D. 1890, by filing the relator's affidavit, upon which he prayed for the issuance of a writ of mandate directed to Edwin A. Kenney, auditor of the State of Montana, commanding him to forthwith audit and settle and issue relator a certificate for a certain alleged claim in favor of relator against the State of Montana in the sum of three hundred and thirty-nine dollars, for mileage and *per diem* for attendance as a member of the House of Representatives of the legislative assembly of the State of Montana.

The affidavit of the relator recites the following facts: "That affiant, William Thompson, is over twenty-five years of age, now is, and has been for more than twenty-five years last past, a resident of the Territory and State of Montana, and for three years last past has been a resident of the county of Silver Bow; the said county being one of the representative districts of the State of Montana. That at the election held in the Territory of Montana on the first Tuesday of October, A. D. 1889, under the provisions of an act of Congress entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota and South Dakota, Montana, and Washington, to form State constitutions and State governments, and be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," approved February 22, 1889, and as further provided for by the constitution, ordinances, and schedule framed by the constitutional convention for the State of Montana, and adopted by the people thereof, the relator, William Thompson, was a candidate for election to the office of representative in the legislative assembly of the State of Montana from said representative district, composed of the county of Silver Bow. That relator was

voted for at said election, and was elected to the office of representative from said district. That the returns of said election were made by the various judges of election in said district to the clerk of said Silver Bow County, and that fifteen days thereafter the chairman of the board of county commissioners of said Silver Bow County, taking to his assistance two officers of said county, canvassed the returns of said election, and declared the result thereof, so far as county officers were concerned; and that, so far as the members of the legislative assembly were concerned, the returns of said election were made to the secretary of the Territory of Montana. That, thirty days after said election, all votes for the members of the legislative assembly were canvassed by the governor, chief justice, and secretary of the Territory of Montana, who then and there found, ascertained, declared, and certified that the affiant, William Thompson, was duly elected to the House of Representatives of the legislative assembly of Montana as a member thereof; and that the said governor and secretary of the Territory of Montana delivered to affiant a certificate, over their hands and seal of said Territory, certifying and declaring that at such election aforesaid affiant had been elected a member of the House of Representatives of the said legislative assembly. That on the twenty-third day of November, A. D. 1889, at twelve o'clock noon, pursuant to the proclamation of the governor of Montana, the legislative assembly of the said State was convened, and affiant appeared at the capital of the State at that time, and in conjunction with twenty-nine other persons, who had, as aforesaid, been ascertained, declared, and certified by the aforesaid canvassing board, composed of the governor, secretary, and chief justice of the Territory of Montana, to have been elected from the various representative districts in said State, did meet as the House of Representatives of the State of Montana, at the capital of said State, and in the place by them and the auditor of said State agreed upon, of which place of meeting previous public notice had been given. That then and there, in a room provided for that purpose, the relator and said twenty-nine other persons convened, and were called to order by the auditor of the State of Montana, and thereupon the said thirty members proceeded to qualify and organize the House of Representatives of the legislative assembly of the State of Mon-

tana, by the election of Aaron C. Witter, one of said members, as speaker of the House of Representatives, and Benjamin Webster as chief clerk thereof. That such proceedings were then and there had by the members of said house as that a committee thereof was appointed on credentials, to which committee the said thirty members presented severally a certificate signed by the governor and secretary of Montana, and over the seal of the Territory of Montana, certifying and declaring that each of them had been duly elected members of the House of Representatives of the legislative assembly of the State of Montana. That said committee on credentials then and there reported to the said house that the said thirty members aforesaid, including affiant, were duly elected members of the House of Representatives of the legislative assembly of the State of Montana, and entitled to seats therein, which said report was approved and adopted by the said house. That thereafter the said house continued to sit from day to day, from that date, to wit, November 23, A. D. 1889, to the date of the signing of affiant's affidavit, to wit, January 16, A. D. 1890; and that affiant has attended said sessions, from that time until the date of making this affidavit, as a member of said House of Representatives, except on the thirteenth day of January, A. D. 1890. That affiant traveled the distance of seventy-five miles in going by the nearest usually traveled route from his residence to the capital of said State to attend said legislative assembly. That on the said twenty-third day of November, A. D. 1889, the affiant and all of the said twenty-nine members took the oath prescribed by the constitution of the State of Montana as members of the legislative assembly of the State of Montana, and that the said thirty members have attended upon the various sessions of the said house. That on the sixteenth day of January, A. D. 1890, affiant presented to Edwin A. Kenney, who was then the auditor of the State of Montana, at his office, an account against the State for his services and attendance as a member of the house aforesaid, at the rate of six dollars per day, and for mileage at the rate of twenty cents per mile for the distance traveled as aforesaid, as provided by law, and requested the said auditor to audit and settle the said claim, and give affiant a certificate thereof; but to audit and settle said claim, or give affiant a certificate thereof,

or any part thereof, the said auditor did then and there refuse, nor would the said auditor approve said claim, or any part thereof." To which affidavit affiant attaches an account as "Exhibit A," which he verifies as a copy of the said account presented to said auditor, and referred to in his affidavit.

Upon this showing an alternative writ of mandate was issued out of this court requiring the said Edwin A. Kenney, auditor of the State of Montana, to forthwith audit and settle said claim against the treasury of the State of Montana, and give to said William Thompson a certificate thereof, or to show cause before this court at ten o'clock A. M., January 20, A. D. 1890, why he had not done so. To this process the respondent made his verified answer, wherein he expressly admitted in detail all the affirmative allegations set forth in the relator's affidavit; but in addition to such express admissions the respondent alleged other matters as follows: "Defendant further says, that in the county of Silver Bow, which is a representative district, ten persons were apportioned to be elected members of the House of Representatives. That as to the election of five of said persons no controversy has arisen; but as to the said relator, and four of his colleagues sitting with him in the house aforesaid, a controversy as to their election has arisen; and unless they are *prima facie* members of such house, and entitled to act therein, no quorum has been present in said house, and the organization thereof has been without legislative validity. That the said house is composed of thirty members, whose muniment of title is the ascertainment, declaration, and certificate of the canvassing board, consisting of the governor, chief justice, and secretary of the Territory of Montana, as provided in ordinance No. II. passed by the constitutional convention of the State of Montana. That on the twenty-third day of November, A. D. 1889, twenty-four persons, from various representative districts in the State of Montana, who had been ascertained and declared to have been elected members of said House of Representatives by the governor, chief justice, and secretary aforesaid, under said ordinance of the constitution, did meet at another place in the capital of said State, and five members from the county of Silver Bow, one of whom assumed to have been elected in lieu of relator, met with said members last aforesaid, and having been

declared not elected by the said canvassing board, provided for in said ordinance, did nevertheless assume to be members of the House of Representatives, and did then and there present, as their muniment of title to said office, each a certificate signed by the county clerk and recorder of Silver Bow County, over his seal, certifying and declaring that such person was elected one of the representatives of the district of Silver Bow County, as representative in said house." To the foregoing new matter, set forth by respondent, the relator filed his replication as follows: *First*, the relator "denies that any controversy has arisen as to his election and the election of four of his colleagues from the county of Silver Bow, as set forth in said answer; *second*, avers that at the time the said house was organized, and when said house passed upon the report of the committee on credentials, as set forth in relator's application, a quorum of said house was present, and acted therein." The parties rested their case upon the allegations, admissions, and denials in the pleadings above set forth, and upon the questions raised therein the case was argued, and submitted to the court for decision.

At the commencement of the consideration of the questions involved herein it is proper to notice the scope and effect of the relator's replication. He denies therein "that any controversy has arisen as to his election, and the election of four of his colleagues;" but he does not deny the further facts set out in respondent's answer. Those specific facts alleged stand unchallenged, and were urged upon the consideration of the court as ground for the refusal on the part of the respondent to audit and settle relator's claim, and to grant him a certificate thereof, as provided by law. The relator relied upon the facts alleged in his affidavit, expressly admitted by respondent's answer, as grounds for the relief which he prayed for. The effect of these pleadings raised questions of law only. No issues of fact were made upon which evidence could properly be introduced. The denial made by the relator's replication was nothing more than a denial of an immaterial allegation. Compiled Statutes Montana, section 575 of the Code of Civil Procedure, relating to writs of mandate, provides as follows: "If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial

statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing the argument of the case."

This court is given original jurisdiction to hear and determine actions of this character by section 3, article viii. of the Constitution of Montana, as follows: "The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power, in its discretion, to issue and hear and determine writs of habeas corpus, mandamus, *quo warranto*, *certiorari*, prohibition, and injunction, and such other original and remedial writs as may be necessary and proper to the complete exercise of its appellate jurisdiction." In reference to the office of the writ of mandamus, the Compiled Statutes of Montana (§§ 566, 567, Code Civ. Proc.) provide as follows: "Sec. 566. It may be issued by any court in this State, except a justice's, probate, or mayor's court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person." "Sec. 567. The writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It shall be issued upon affidavit on the application of the party beneficially interested."

It must now be determined whether or not the act, the performance of which is here sought to be compelled, is one which the law especially enjoins upon the respondent as a duty resulting from his office as auditor of this State. This involves two propositions: *First*. Is the relator entitled, upon the facts shown, to have his said claim audited and settled, and to receive a certificate thereof? *Secondly*. Does the law enjoin upon the State auditor the duty of auditing and settling said claim, and issuing to relator a certificate thereof? These propositions will be considered in the order stated.

To the high office of legislator, and to persons occupying that office, the law guaranties certain rights, privileges, and emolu-

ments, which courts of justice will regard and enforce in proper cases and upon proper showing. (Const. Mont. art. v. §§ 5, 15; 1 Blackst. Com. 164, and notes and cases cited; Cush. Law & Pr. Leg. Assem. §§ 546-597, inclusive; Cooley's Constitutional Limitations, 162, 163; Jefferson's Manual; Robert's Manual; 1 Kent Com. 235.) But in passing upon a question of this character, relating to a person claiming to be a member of the legislative assembly of the State, this court is mindful of the constitutional provision which places the power to try the ultimate right to the office in another forum, i. e., in the legislative house wherein the person claims a seat. (Const. Mont. art. v. § 9.) That body, and that alone, having the plenary jurisdiction to try the ultimate right to the office, it must be determined in the case at bar on what character of *prima facie* evidence will courts of justice enforce collateral or incidental rights and privileges belonging to the members of the legislative assembly; in other words, as applicable to this case at bar, what constitutes in the view of courts of justice sufficient *prima facie* evidence of his membership in the House of Representatives of this State to entitle the relator to the relief which he asks; that is, to have his claim to the emoluments of the office of representatives from Silver Bow County audited, settled, and certified. Under our republican form of government, election to this office is made by the votes of the legally qualified electors of the district in the manner prescribed by law, and the result of such election is ascertained in a manner prescribed by law, through the returns and canvass of such votes by legally constituted canvassing boards. The courts have uniformly given credit to the result of an election as ascertained and declared or certified by the legally constituted canvassing board, to whom the law has committed the duty of canvassing the returns of the election, and declaring the result, until this evidence of the election has been overborne by the trial and determination of the ultimate right to such office by the tribunal having jurisdiction to try and determine the same. (*Crowell v. Lambert*, 10 Minn. 369; *State v. Churchill*, 15 Minn. 455; *State v. Sherwood*, 15 Minn. 221; 2 Am Rep. 116; *People v. Miller*, 16 Mich. 56; *Swinburn v. Smith*, 15 W. Va. 483; *Hulseman v. Rems*, 41 Pa. St. 396; *Kerr v. Trego*, 47 Pa. St. 292; *Commonw. v. Baxter*, 35 Pa. St.

263; *De Armond v. State ex rel. Campbell*, 40 Ind. 469; *Hadley v. City of Albany*, 33 N. Y. 603; 88 Am. Dec. 412.) This is not only the rule governing the action of courts, but it is the practice adopted in the organization of legislative bodies, and admitting members thereto, until the *prima facie* evidence contained in the certificate of election issued by the legally constituted canvassing board is set aside by the proper authority in the determination of a contested election. (Cush. Law & Pr: Leg. Assem. §§ 141, 142, and 229–241, inclusive.) The authorities reviewed and cited by this eminent author amply show the practice upon this question. (McCrary on Elections, §§ 270–285, inclusive, and cases cited; Jefferson's Manual [12th ed.], 390.)

In the case at bar it is asserted, and not denied, that another person holds a certificate of election to the same office which the relator claims to be occupying, issued by the county clerk of Silver Bow County. It therefore becomes necessary, in the determination of this case, to ascertain what board or person is by law authorized to canvass the returns of the election in question, and ascertain and certify the result, so as to entitle the person holding that muniment of title to the office, *prima facie*, to maintain his case in an action of this character. If the right of relator to the certificate of election which he holds is challenged, let the question be raised and determined in the proper forum; but if the legislative body of which the relator claims to be a member, vested, as it is, with the powers which the constitution of this State has committed to it, and in view of the long line of precedents which have guided the action of such bodies in like cases, does not determine a controversy as to the election of the relator, then, in the nature of the case, there exists no better evidence of his right to relief than the finding or certificate of the legally constituted canvassing board, charged with the duty of ascertaining the result of the election in question. The title to an elective office, in a large majority of cases, rests on this *prima facie* evidence, because in the great majority of cases there is no adjudication of the right to the office which inquires back of the returns of the proper canvassing board. It is proper to observe here that under well-established rules of law, if it was shown that a contest of the election of the relator

was pending in the house of which he claims to be a member, and to which he holds a certificate of election, then this court would withhold judgment until the case was determined; but no such fact appears. The relator's certificate of election emanates from a canvassing board composed of the governor, chief justice, and secretary of Montana Territory, accredited by the signatures of the said governor and secretary and the seal of the Territory. The other certificate, which is set up in opposition to this, as held by another person, emanates from the county clerk of Silver Bow County, accredited under the hand and official seal of that officer. In the absence of any mention of this latter certificate, the consideration of this case necessarily involves the question as to whether the relator's certificate of election issues from the legally constituted canvassing board, charged with the duty of ascertaining, from the returns, the election of members of the House of Representatives. The *prima facie* right to relief rests upon the credentials, with the facts of service.

The act of Congress above mentioned, enabling the people of Montana and other Territories to form and adopt constitutions and set up State governments, provides in section 8 as follows: "At the elections provided for in this section, the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same." Section 9 of the same act provides as follows: "That until the next general census, or until otherwise provided by law, said States shall be entitled to one representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the representatives to the fifty-first Congress, together with the governors and other State officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution, and the States respectively are admitted into the Union, the territorial officers shall continue to discharge the duties of their

respective offices in each of said Territories." Section 24 of the same act provides as follows: "That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and representatives in the fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this act. In case the constitutions of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two senators of the United States; and the governor and secretary of State of such proposed State shall certify the election of the senators and representatives in the manner required by law; and when such State is admitted into the Union the senators and representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of senators and representatives of other States in the Congress of the United States; and the officers of the State governments, formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories at the time of their admission into the Union shall be in force in said States, except as modified or changed by this act, or by the constitutions of the States, respectively." Section 25 of the same act provides as follows: "That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed."

Having reviewed these provisions of the enabling act of Congress, we will proceed to the constitution of Montana, and consider its provisions upon this subject. Section xx., "Schedule," section 1, provides as follows: "All laws enacted by the legislative assembly of the Territory of Montana, and in force at the time the State shall be admitted into the Union, and not inconsistent with this constitution or the constitution or laws of the the United States of America, shall be and remain in full force as the laws of the State until altered or repealed, or until they expire by their own limitations." Section 17 of the Schedule in the State constitution provides as follows: "All territorial, county, and township officers now occupying their respective

positions under the laws of the Territory of Montana, or of the United States of America, shall continue and remain in their respective official positions, and perform the duties thereof, as now provided by law, after the State is admitted into the Union, and shall be considered State officers until their successors in office shall be duly elected and qualified, as provided by ordinance, notwithstanding any inconsistent provisions in this constitution, and shall be entitled to the same compensation for their services as is now established by law; *provided*, that the compensation for justices of the Supreme Court, governor, and secretary of the Territory shall be paid by the State of Montana." Passing to ordinance No. II., referred to in the last above-quoted section, ordained and promulgated by the constitutional convention, with the constitution of the State, and adopted by the people, we find provisions as follows: "*First*. That an election shall be held throughout the Territory of Montana on the first Tuesday of October, A. D. 1889, for the ratification or rejection of the constitution framed and adopted by this convention." "*Fifth*. The votes cast at said election for the adoption or rejection of said constitution shall be canvassed by the canvassing boards of the respective counties not later than fifteen days after said election, or sooner, if the returns from all the precincts shall have been received, and in the manner prescribed by the laws of the Territory of Montana for canvassing the votes at the general election in said Territory; and the returns of said election shall be made to the secretary of the Territory, who, with the governor and the chief justice of the Territory, or any two of them, shall constitute a board of canvassers, who shall meet at the office of the secretary of the Territory on or before the thirtieth day after the election, and canvass the votes so cast, and declare the result. *Sixth*. That on the first Tuesday in October, A. D. 1889, there shall be elected by the qualified electors of Montana, a governor, a lieutenant-governor, a secretary of State, an attorney-general, a State auditor, a superintendent of public instruction, one chief justice and two associate justices of the Supreme Court, a judge for each judicial district established by this constitution, a clerk of the Supreme Court and a clerk of the District Court in and for each county of the State, and the members of the legislative

assembly provided for in this constitution. The terms of the officers so elected shall begin when the State shall be admitted into the Union, and shall end on the first Monday in January, A. D. 1893, except as otherwise provided. *Seventh.* There shall be elected at the same time one representative in the fifty-first Congress of the United States. *Eighth.* The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the secretary of the Territory and canvassed in the same manner, and by the same board, as is the vote upon the constitution, except as to clerk of the District Court."

It is clear that said act of Congress, legislating for the people of the Territory of Montana, supplemented and carried out by the constitution and ordinances framed and promulgated by the constitutional convention, and ratified by the people of the Territory, covered the whole question as to what board should canvass the votes cast at the late election, both for and against the constitution, and for members of the legislative assembly and State and district officers, and declare the result. The fifth paragraph of ordinance II., above quoted, requires that the returns of said election for the adoption or rejection of the constitution "shall be made to the secretary of the Territory, who, with the governor and the chief justice of the Territory, or any two of them, shall constitute a board of canvassers, who shall meet at the office of the secretary of the Territory on or before the thirtieth day after election, and canvass the votes so cast, and declare the result." The eighth paragraph of the same ordinance provides "that the votes for all the State officers, members of the legislative assembly, and district judges shall be returned and canvassed in the same manner, and by the same board, as is the vote upon the constitution."

It is contended by the respondent that a statute of the Territory of Montana, existing prior to the said act of Congress, and prior to the adoption of the constitution, provided contrary to the act of Congress and the constitution and ordinances above quoted, in that this statute provides that the canvass of the votes cast for members of the legislative assembly shall be made by the boards of county commissioners of the respective counties in the Territory, and certificates of election shall be issued by the

clerk of the board of county commissioners. (Comp. Stats. § 1033, p. 930.) This position is untenable. There are no statutes of the Territory of Montana brought over and adopted by the people of this State contrary or in conflict with the constitution thereof, for this plain reason: It is provided by the act of Congress above quoted, enabling the people of said Territory to form a constitution and State government, that "all laws in force, made by said Territories at the time of their admission into the Union, shall be in force in said States, *except as modified or changed by this act, or by the constitutions of the States, respectively.*" (Act of Congress, *supra.*) This provision was further amplified by section 1 of section xx., "Schedule," of the constitution of Montana, in these terms: "All laws enacted by the legislative assembly of the Territory of Montana, and in force at the time the State shall be admitted into the Union, and not inconsistent with this constitution, or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the State until altered or repealed, or until they expire by their own limitation." By these provisions the statute law of Montana Territory is remoulded at once to join in harmony with the State constitution. An example of this modification or remoulding of the statute law to harmonize with the constitution is found in reference to the formation of the grand jury. The express letter of the statute as in force up to the time the State was admitted into the Union provided that this body should consist of sixteen persons in number, of whom twelve could find an indictment. The State constitution provides that the grand jury shall consist of seven persons, of whom five are competent to find an indictment. It has been abundantly proved, by the act of Congress and the State constitution, that the statute is in force as modified by the constitution; and it cannot be maintained, either as a logical or reasonable conclusion, that there is a conflict, where the latter and paramount organic law has expressly adopted the former statute law as modified by the constitution. (*State v. Ah Jim*, 9 Mont. 167.)

Counsel for respondent, in this connection, contends that the ordinances framed by the constitutional convention, and appended to the constitution, were not a part of that instrument, and did

not have the force and effect of constitutional provisions. That for this reason the provisions of the ordinance declaring that the governor, chief justice, and secretary of Montana should constitute a canvassing board to canvass the votes and declare the result of the election of members of the legislative assembly, was impotent to work a change or modification of the statute providing that the certificates of election of such members shall be issued by the county clerk. Hence that statute stands in full force, and the county clerk's certificate is the best *prima facie* evidence of a party's right to a seat in the legislative assembly. No authorities have been brought to the attention of the court to sustain the respondent's position in respect to ordinances framed and promulgated by constitutional conventions. It appears this question was raised in the case of *Stewart v. Crosby*, 15 Tex. 546, wherein Justice Wheeler, in passing upon this point, says: "We think it free from doubt that the ordinance appended to the constitution is a part of the fundamental law of the land. Having been framed by the convention that framed the constitution of the State, and adopted by the convention and the people, along with the constitution, it is of equal authority and binding force upon the executive, legislative, and judicial departments of the government of the State as if it had been incorporated in the constitution, forming a component part of it." The case cited appears to have involved questions of great importance, as shown by the remarks of the judge at the commencement of the opinion, as follows: "In the argument of this case, questions of great moment to the parties, involving an inquiry respecting the constitutionality of the legislative enactments which they have invoked, and on which they rely to maintain their claims, have been discussed." Mr. Paine, in his work on Elections, section 294, announces the same doctrine, as does the case of *Stewart v. Crosby*, *supra*, in the following terms: "To launch a new constitution, certain machinery and arrangements are always necessary, which, having subserved this single purpose, are of no further use. These might, of course, be provided in the constitution itself, but to incorporate temporary provisions into the body of a permanent constitution would be to encumber the instrument with matter which might more properly be excluded from the text of the

constitution, and placed in such a form as to be dropped when all the uses for which it was provided have been fully subserved. Accordingly, these provisions for inaugurating new State constitutions usually take the form of detached ordinances or schedules. The validity and effect of these provisions are precisely the same, whether they are placed in the ordinance or schedule, to be thrown aside when no longer needed, or imbedded in the text of the constitution, to remain a permanent blemish after the accomplishment of all the purposes for which they were required. It is clearly competent for a constitutional convention, by an ordinance or schedule, to change the time for holding the general election of the State. . . . The people of the State, in their constitutional conventions, are always their own masters. There is nothing to restrain them from giving whatever form they prefer to its organic law, except the constitution of the United States, and treaties made and laws enacted by the United States in pursuance thereof."

To declare that the county clerk's certificate of election to the office in question is the highest *prima facie* evidence of title to the office, as against the certificate of the canvassing board constituted by the act of Congress, and the ordinance framed by the constitutional convention and adopted by the people, would be, in effect, to declare that the provisions of the statute in this respect stand without modification by the act of Congress and constitution and ordinances, and prevail over them. If the ordinance did not work a change in the statute in this particular, how can it be maintained that the same ordinance worked such important changes in other respects? The effect of ordinance No. II. was to terminate the terms of all the elective officers of the Territory of Montana, while under the literal statutory provisions their terms of office would have continued for more than a year. And under that theory the officers elected at the late election, under this ordinance, who have taken possession of these offices, are there without authority. The logical analogies of this theory need not be further traced. It destroys itself by its inherent fallacy, without the force of the authorities above quoted to the contrary. The constitutional convention was authorized, by act of Congress, to make provision, "by ordinance," for the election of officers for full State government.

In the body of the constitution, at section xvii., "Schedule," the State officers to be "duly elected and qualified, as provided by ordinance," are referred to. The ordinance was framed and adopted by the convention, promulgated to the people, and by them ratified. The provisions of the constitution and ordinance relating to carrying out the election, to set in motion the State government, was intended for execution within a short time after the constitution was framed. The plain intent of the convention when framing ordinance No. II. is shown in the provision dividing the State, legislative, and district officers into one class, and directing that the returns of the election of these officers should be made to the secretary of the Territory, and canvassed in the same manner and by the same board as the vote upon the constitution; and in the ninth paragraph of that ordinance the election of the county and township officers was provided for; and the tenth paragraph provides that the votes for the above county and township officers, and for clerk of the District Court, shall be returned and canvassed as is now provided by law. The effect of the ordinances upon the statute is to change and modify its provisions so far as is necessary to give the provisions of the ordinance full scope and effect. It follows that the relator's certificate of election emanates from the legally constituted canvassing board, and will be admitted in this action as *prima facie* evidence of his election to the office in question.

The facts of attendance upon the sessions of the house, and as to distance traveled, are asserted by the affidavit of the relator, and admitted by the verified answer of respondent. No question has been raised upon these matters set forth in relator's affidavit. The constitution of the State fixes the amount of compensation at six dollars for each day's attendance, and twenty cents per mile for each mile necessarily traveled, by the nearest usually traveled route, in going to the seat of government from the member's residence, and returning thereto; and the relator's claim conforms to these prescribed rates.

It remains to be determined whether the law enjoins upon the State auditor the duty of auditing and settling said claim, and issuing to the relator a certificate thereof. Section 121, fifth division, Compiled Statutes, provides as follow: "He shall audit all claims against the treasury, and when the law recognizes a

claim, but no appropriation has been made therefor, shall settle the claim, and give the claimant a certificate thereof, and report the same to the legislative assembly." This provision of the statutes should be considered in connection with section 20 of article vii. of the State Constitution, which section provides as follows: "Sec. 20. The governor, secretary of State, and attorney-general shall constitute a board of state-prison commissioners, which board shall have such supervision of all matters connected with the State prisons as may be prescribed by law. They shall constitute a board of examiners, with power to examine all claims against the State, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board." The section of the statute above quoted provides that the auditor "shall audit all claims against the treasury; and when the law recognizes a claim, but no appropriation has been made therefor, shall settle the claim, and give the claimant a certificate thereof, and report the same to the legislative assembly." The constitution has created a board of examiners, with power to examine all claims against the State, except salaries or compensation of officers fixed by law; and provides that "no claims against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board." The salaries or compensation of officers fixed by law being expressly, in all cases, excepted by the provisions of the constitution from the action of said board of examiners, the duty of the State auditor, under the statute, is clear as to the relator's claims. No other class of claims against the State is presented in this action than the compensation of an officer fixed by law. However, it is deemed proper to consider the statutory and constitutional provision together, so that no misapprehension will arise as to the decision herein. The relator asks that his claim against the State for compensation for service as a member of the House of Representatives of the legislative assembly of this State, for the fifty-four days' attendance at the session of that

body, together with mileage for seventy-five miles traveled, by the nearest usually traveled route, from his residence to that assembly, at the rate fixed by law, amounting to three hundred and thirty-nine dollars, be audited and settled, and that a certificate thereof be given him by the respondent, Edwin A. Kenney, auditor of the State of Montana. Under the provisions of law and the showing in this action, it is held by this court that the relator is entitled to the relief prayed for; that the relief prayed for is a duty specially enjoined upon the State auditor, as resulting from his office; that the writ of mandamus is the proper remedy herein. Wherefore it is ordered that a peremptory writ of mandate be issued in the form provided by law, as prayed for in relator's affidavit.

DE WITT, J., concurs.

Chief Justice BLAKE, having been a member of the canvassing board mentioned in the above opinion, did not sit in the hearing and the determination of this action.

HARMON, RESPONDENT, v. COMSTOCK HORSE AND CATTLE COMPANY, APPELLANT.

PLEADING—*Jurisdiction of inferior court.*—In pleading the judgment of a court of inferior jurisdiction, as a Probate Court, and the issuance of an attachment therefrom, the complaint must allege the facts which gave such inferior court jurisdiction over the defendant therein, and authorized it to issue the writ.

SAME—*Judgment—Issuance of attachment.*—Where in such case it was alleged that the writ of attachment was "procured," and the judgment was "rendered," held, that the allegations did not show the issuance of a valid writ of attachment or the entry of a lawful judgment, and that the pleading was fatally defective.

SAME—*Attachment of range stock.*—In an action for damages for the conversion of certain horses, alleged to have been attached as range stock under the provisions of chapter 6, title 7 of the Code of Civil Procedure, in an action in a Probate Court, the complaint must show that the horses referred to were range stock within the meaning of the statute.

ATTACHMENT—*Service of process—Office hours.*—Chapter 6, title 7 of the Code of Civil Procedure provides in substance that range stock may be attached between the first day of November and the next succeeding fifteenth day of May, by the filing of a copy of the process with the recorder of the county. The filing in the case at bar was made with the proper officer upon the fourteenth day of May, at 10:30 p. m. Held, that section 911, fifth division of the Compiled Statutes, providing that county offices shall be kept open during the business hours of each day, does not prohibit the transaction of official business at other times, and the service of the process was valid.

9	243
11	85

9	243
19	227

9	243
25	883

9	243
30	477

9	243
132	578

Appeal from Fourth Judicial District, Custer County.

The cause was tried before LIDDELL, J., without a jury.

The findings and judgment were for the plaintiff. Defendant appeals from an order overruling a motion for a new trial.

James W. Strevell, and James H. Garlock, for Appellant.

The complaint does not allege sufficient facts to show that the Probate Court acquired any right to issue a writ of attachment in the case of *Harmon v. Speelman*, in that court. There is not an intimation that a complaint was filed in the Probate Court, or that a summons was issued or served upon Speelman, or that an undertaking on attachment was given; nothing only that he "procured from said court a writ of attachment." That Probate Courts in this Territory are courts of limited jurisdiction, it would seem a waste of time to argue. (Rev. Stats. U. S. § 1932.) If they are courts of inferior jurisdiction, then no presumption can be rightfully indulged in favor of the correctness of their proceedings; on the contrary, a complaint claiming a right which is alleged to have been acquired by a proceeding in such court, must contain such averments as will show that the inferior court had jurisdiction to issue the writ under which the right or interest is claimed. (*Frees v. Ford*, 6 N. Y. 176; *Van Etten v. Hurst*, 6 Hill, 311; 41 Am. Dec. 748; *Bowman v. Russ*, 6 Cowen, 234; *Van Buskirk v. Irving*, 7 Cowen, 35; *Whitney v. Shufelt*, 1 Denio, 592; *Staples v. Fairchild*, 3 N. Y. 41; *Winter v. Fitzpatrick*, 35 Cal. 269; *Low v. Alexander*, 15 Cal. 297.) The complaint did not show that the property sought to be attached in the Probate Court was such property as is "commonly known as range stock," or that it was "running and roaming at large upon the range." Both of these conditions must exist before this statute can be made available in relation to such property, and must be alleged in the complaint. (*Manton v. Tyler*, 4 Mout. 364; *Dye v. Dye*, 11 Cal. 163; *Rhoda v. Alameda County*, 52 Cal. 352.) The plaintiff not only does not allege that this property was range stock and running at large, but when the defendant intimates such a thing, he denies it by his replication in express terms. The copy of

the writ and notice of attachment in the case in the Probate Court was not filed in the office of the recorder at a time of the year when property could be attached in that way. The writ was filed at the hour of 10:30 P. M., of May 14th, and long after the office had been closed to business on that day. A writ and notice filed at that time was not constructive notice to any one, and hence no right would accrue under it. The time expired with the closing of the office of the recorder for business on the fourteenth day of May. Being filed as it was, after the close of ordinary business hours, it could not be deemed a public record, or to impart notice to any one until the opening of the office for business on the following day, the fifteenth day of May, which was too late for the levying of an attachment in that way. (*Hathaway v. Howell*, 54 N. Y. 97; *Wardell v. Mason*, 10 Wend. 573; *McFarland v. Pico*, 8 Cal. 626.)

C. R. Middleton, for Respondent.

On the question that the complaint does not show that the Probate Court acquired jurisdiction to issue the writ of attachment, the respondent submits that an examination of the complaint will show that this plaintiff commenced an action in the Probate Court of said county against one Speelman, and in that action procured the issuance of a writ of attachment out of said court, which writ was served by the sheriff by the filing of a copy thereof, with a notice specifying the property attached, in the office of the county clerk of said county. Copies of this writ and notice are made a part of the complaint in this action. The allegation of the complaint "that the plaintiff commenced a suit in the Probate Court," etc., is equivalent to an averment that he filed a complaint. The issuing of a summons is not jurisdictional under our statute. The statute providing for the constructive levy of an attachment during certain months of the year on any cattle or horses running or roaming at large, does not contemplate that such animals must be identified as range stock, for that would be unreasonable and impossible. The New York statute, under which the case of *Hathaway v. Howell* (cited by appellant) was decided, specifically defines the hours of each day during which the office of county clerks shall be kept open, and is not authority in this case, for the reason that our statute has

not attempted to define what is meant by business hours. The court will not reverse a judgment on the ground that the complaint does not state the facts quite as fully as it ought. If no demurrer has been interposed there must appear to be an entire want of material facts to justify the disturbing of the judgment. (*Hibernia S. & L. Society v. Ordway*, 38 Cal. 679; *Gardner v. Marshall*, 9 Cal. 268.)

BLAKE, C. J.—This action was commenced by Harmon to recover damages for the wrongful taking by the appellant, a corporation, of certain horses which are described in the complaint. The cause was tried by the court below without a jury, and the findings of the facts which are pertinent to this hearing are to this effect, to wit: That Harmon commenced an action May 14, 1887, in the Probate Court of Custer County, against one Speelman, upon an account for \$200.16; that an attachment was then issued out of said court, and placed in the hands of the sheriff of the county; that the writ of attachment was levied the same day upon said horses, by filing a copy thereof in the office of the recorder of deeds of the county, with a list of said property annexed thereto, and a notice that the said range stock was attached by virtue of the writ; that said horses were then range stock, and running and roaming at large upon the range; that afterwards the appellant, without the consent of Harmon or the sheriff, took and drove away the horses from their range, and converted them to its use; that a judgment was entered in the Probate Court June 3, 1887, for Harmon and against Speelman, for the sum of \$255.66, which has not been paid, and is wholly due; that the sheriff, after diligent search, has not been able to find the horses, or any property of Speelman out of which any part of said judgment can be satisfied; and that Harmon has been damaged by these acts of the corporation in the sum of \$255.66. The judgment was entered accordingly for Harmon. The motion for a new trial was refused, and the corporation appealed.

No testimony was offered by the company, and the notice of the motion for a new trial specifies the particulars in which the evidence produced on the trial is insufficient to justify the findings. An examination of the transcript satisfies us that none of

the findings can be set aside upon this ground. An analysis of the testimony, and a statement of the deductions therefrom, would be valueless to the parties, and are therefore omitted.

The errors of law which are assigned and relied on in the brief of the appellant will be reviewed. At the trial the appellant made many objections to the introduction of the testimony, which depend upon one legal proposition: that the complaint does not state facts sufficient to constitute a cause of action, and that it does not appear that the Probate Court had the right to issue the writ of attachment in the case of *Harmon v. Speelman*. We quote from the pleading the paragraphs which relate to these matters:—

“That on the fourteenth day of May, A. D. 1887, the plaintiff commenced a suit in the Probate Court of said county against one S. F. Speelman upon an account for the sum of \$200, and interest thereon, and then and there procured from said court a writ of attachment in said cause.

“. . . . That on the third day of June, A. D. 1887, the said Probate Court rendered judgment in favor of this plaintiff, and against the said S. F. Speelman, in the sum of \$209.56, and costs in the sum of \$46.10, amounting in all to the sum of \$255.66.”

These allegations are not denied by the answer, and for the purposes of this action must be taken to be true. This court has held in *Charlebois v Bourdon*, 6 Mont. 376, that “the Probate Court is of limited jurisdiction.” In pleading at common law the judgment of this inferior tribunal, it is necessary to set forth the facts which confer jurisdiction. (*Turner v. Roby*, 3 N. Y. 193, and cases cited; *Smith v. Andrews*, 6 Cal. 652; *Townsend v. Gordon*, 19 Cal. 188.) The rule has been modified in this State by the enactment of the following section of the Code of Civil Procedure: “In pleading a judgment or other determination of a court or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.” (§ 103.) Statutes of the same import have been passed in New York, California, Indiana, Nevada, and other States, and received judicial interpretation.

In *Hunt v. Dutcher*, 13 How. Pr. 540, the court holds that an allegation that "judgment was entered in said action . . . is clearly not equivalent to the words that such judgment has been, or was 'duly given or made.'" In *Young v. Wright*, 52 Cal. 410, Mr. Justice Crockett, in the opinion, says: "A party wishing to avail himself of a provision of this character must comply strictly with its terms. In exonerating him from an obligation which would otherwise be incumbent upon him, the statute prescribes the precise conditions on which he is to be relieved; and they must be strictly performed. In this case the averment is not that the judgment was duly 'given or made,' but that it was 'duly rendered'; and we are inclined to think these are not equivalent terms. A judgment is duly 'rendered' when it is duly pronounced and ordered to be entered. (*Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 Cal. 207; *Genella v. Relyea*, 32 Cal. 159.) But a judgment duly 'made or given' is a complete judgment properly entered in the judgment book, so that it may be pleaded in bar of another action." In *Keys v. Grannis*, 3 Nev. 551, the court says: "To show the jurisdiction is as necessary, under our practice, as it ever was; the only change being in the manner of stating it." (See, also, *Crake v. Crake*, 18 Ind. 156; *Judah v. Fredericks*, 57 Cal. 391; *Los Angeles v. Mellus*, 59 Cal. 451.)

This court held, in *Territory v. Cox*, 3 Mont. 205, that an averment is sufficient in a complaint which alleges that letters testamentary which had been granted were "duly revoked" by the Probate Court. In *Hootman v. Bray*, 3 Mont. 411, Chief Justice Wade says, in the opinion: "Neither the original answer nor the proposed amendment contain any averment showing that the attachment was regularly issued by a court having jurisdiction; and this, we hold, is a fatal defect in a case like the one we are considering, where the plaintiff claims the property by a prior sale, and the officer attempts to justify the levy by impeaching such sale for fraud."

We are not required to state fully the pleadings in this action, but assert that the respondent cannot prevail unless he alleges and proves the issuance of a valid writ of attachment, and the entry of a lawful judgment. The foregoing facts, which are material and relevant, lead to this conclusion. The writ of

attachment was essential to enable the respondent to acquire a statutory lien upon the horses. When the allegations of the complaint which have been cited are examined in the light of the authorities, it is plain that they are fatally defective, and do not conform to the rule of the common law, or the statute. It is not averred that the judgment or other determination of the Probate Court has been "duly given or made," but it is alleged that the judgment was "rendered" and the writ of attachment was "procured." The pleading does not contain the facts which would authorize the Probate Court to issue the writ of attachment against the property in controversy, or give it jurisdiction over the defendant Speelman. Among other matters pertaining to the Probate Court in the case of *Harmon v. Speelman*, which should be specified in the complaint, and do not appear, are the following: That a complaint was filed; that a summons was issued and served; that an affidavit of attachment and undertaking on attachment were filed; and that the horses referred to were "range stock," within the purview of the statute providing for the "attachment of live-stock on ranges." The transcript shows that the appellant has been persistent in attacking the complaint, and pointing out these defects; and the respondent should have appealed to the liberality of the Code of Civil Procedure, and the decisions of this court, in allowing amendments to pleadings. The court below erred in overruling the objections of the appellant to the introduction of the testimony in support of the findings.

Another legal question, which will necessarily arise in the retrial of this action, can be finally decided at this time. It appears that the property was attached under the provisions of the Code of Civil Procedure as "horses running and roaming at large and commonly known as 'range stock.'" (Title 7, ch. 6.) The law defines what shall constitute a sufficient service of process "between the first day of November and the next succeeding fifteenth day of May," and that certain copies and notices shall be filed "with the recorder of the county wherein such property is running at large." It is conceded that the proper officer made this filing in his office upon the fourteenth day of May, 1887, in the night-time, at 10:30 P. M. The appellant maintains that this hour was too late for the transaction of

official business, and that the attachment papers cannot be deemed public records to impart notice until the succeeding day. The postponement of the legal consequences of this action of the recorder until the fifteenth day of May would destroy the lien sought to be secured on the horses by these proceedings, and prevent Harmon from levying thereon in this mode until the following month of November. The case of *Hathaway v. Howell*, 54 N. Y. 97, which is cited by the appellant, is inapplicable. The laws of New York prescribe the hours during which the offices of this public nature must be open for the people; and the subject is not definitely regulated by the statutes of the State, although the same shall be opened during the business hours of each day. (Comp. Stats. div. 5, § 911.) But these periods are not fixed, and the transaction of official business at other times is not prohibited.

One section of the Code under investigation provides that "it shall be the duty of said county recorder to file all papers deposited with him for that purpose, and required to be filed under this chapter, and preserve the same as other records of his office are preserved." (Code Civ. Proc. § 226.) "There shall be kept in the recorder's office of the county recorder of each county a book called 'Attachment Book,' in which shall be entered by such recorder, in alphabetical form, the names of any person or persons against whom any writ or notice of attachment has been filed in his office. There shall also be entered in said book the time such writ was filed." (Code Civ. Proc. § 205.) The county recorder has complied in all respects with the laws.

The contention of the appellant cannot be sustained. Blackstone gives this definition: "In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes. (Co. Litt. 135.) Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night, after which the following day commences." (2 Blackst. Com. 141.) In *National Bank v. Burkhardt*, 100 U. S. 689, the court says: "For most purposes, the law regards the entire day as an indivisible unit. But when the priority of one legal event over another, depending upon the order of events occurring on the

same day, is involved, this rule is necessarily departed from." (*Lapeyre v. United States*, 17 Wall. 198; *Garity v. Gigie*, 130 Mass. 184; *Westbrook Manuf. Co. v. Grant*, 60 Me. 93; *Benson v. Adams*, 69 Ind. 354.) The mere fact that the county recorder filed the attachment papers at an hour when his office is usually closed does not invalidate the process in *Harmon v. Speelman*. It is therefore ordered and adjudged that the judgment be reversed, with costs, and that this cause be remanded for a new trial.

HARWOOD, J., and DE WITT, J., concur.

BICKLE, RESPONDENT, v. IRVINE ET AL., APPELLANTS.

PLEADING — *Proof of constructive fraud.* — The facts constituting constructive fraud must be alleged in order to be proved, and are not admissible under a general denial in an answer. (Cases of *Smith v. Auerbach*, 2 Mont. 349; *Botcher v. Berry*, 6 Mont. 418, cited.)

AMENDMENTS. — The refusal of the court below to allow the answer to be amended in order to admit proof of constructive fraud cannot be held error, where it does not appear from the transcript that any amendments were ever prepared or submitted to the court, or that good cause was shown therefor.

Appeal from Fourth Judicial District, Custer County.

The cause was tried before BACH, J. Defendants appeal from an order overruling a motion for a new trial, by LIDDELL, J.

Andrew F. Burleigh, and C. R. Middleton, for Appellants.

Where the plaintiff alleges that he is the owner of personal property described in his complaint, and that the same has been wrongfully taken by the defendant, the defendant may show under a denial of plaintiff's title anything that is inconsistent with the allegations of the complaint. Where the plaintiff shows that he claims ownership by reason of a purchase from a third person, the defendant, under a denial of the plaintiff's title, may show that the purchase was fraudulent as against the creditors of the person from whom he made such purchase. (*Tupper v. Thompson*, 26 Minn. 385; *Kenney v. Goergen*, 36 Minn. 190; *Johnson v. Oswald*, 38 Minn. 550; 8 Am. St. Rep. 698; *Staubach v. Rexford*, 2 Mont. 565; *Meyendorf v. Frohner*, 3 Mont. 282; *Leggatt v. Stewart*, 5 Mont. 107; *Goddard v.*

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Fulton, 21 Cal. 430.) If in order to show the fraudulent character of the sale it was necessary that such fraud should be alleged in the answer, then it was an abuse of discretion on the part of the court in refusing to allow the defendants' offer to amend their answer on the trial. (*Stringer v. Davis*, 30 Cal. 318; *Pierson v. McCahill*, 22 Cal. 127.) Under our practice the rule as to the amendment of pleadings is very liberal. (Comp. Stats. §§ 115, 116.)

J. W. Strevell, and *James H. Garlock*, for Respondent.

Where a sheriff seeks to justify the taking of property under an attachment from one who is a stranger to his writ, he must show an existing debt in favor of the attaching party and against the person attached. (*Thornburgh v. Hand*, 7 Cal. 554; *Ford v. McMaster*, 6 Mont. 240; *Horn v. Corvarubias*, 51 Cal. 524; *Crocker on Sheriffs*, § 866; *Kane v. Desmond*, 63 Cal. 464.) There was no showing made by the defendant to entitle him to amend as required by section 116 of the Compiled Statutes. Defendant could not prove fraud under a general denial. Under a statute like ours, the authorities are without limit to refute such a proposition as that. Fraud is a special defense and must be specially pleaded. (*Smith v. Auerbach*, 2 Mont. 348; *Glazier v. Clift*, 10 Cal. 303; *Terry v. Sickles*, 13 Cal. 427; *Botcher v. Berry*, 6 Mont. 448; *People v. San Francisco*, 27 Cal. 655.)

BLAKE, C. J.—This action was commenced in the Probate Court of Custer County, against the sheriff and his deputy, to recover the possession of certain horses, or the value thereof, and also damages for their wrongful use. The complaint alleged that "the plaintiff was the owner of, and entitled to the possession of," the property. The answer denied this and the other allegations of the plaintiff, and as new matter, pleads a justification for the officers under a writ of attachment. The case was appealed to the District Court, and upon the trial by a jury, the defendants offered to show, by the cross-examination of George Bickle, that after the sale of the horses by him to his brother, the plaintiff, and before the levy of the attachment, the witness "remained in continuous and open possession and control" of the property, "in order to show that the said sale from

this witness to David Bickle was constructively fraudulent under the statutes relating to fraudulent conveyances." The court sustained the objection to this cross-examination and rejected the offer. A judgment was entered against the defendant, who moved for a new trial, and this appeal has been taken from the order refusing the motion.

The appellants contend that the foregoing cross-examination was legitimate, under the denial in the answer of the title of the respondent to the property. The transcript is imperfect, and fails to show the direct testimony of the witness; and we are not informed concerning this important subject. But counsel concur in the statement that the court below ruled that evidence of this character could not be introduced without an allegation in the answer to this effect, and that the general denial was insufficient. The authorities support the proposition. In *Smith v. Auerbach*, 2 Mont. 349, this court, by Mr. Justice Knowles, said: "Where fraud is a necessary part of a plaintiff's or defendant's case, the facts constituting the fraud should be set forth so that the opposite party may know what he has to meet." In *Botcher v. Berry*, 6 Mont. 448, this court, in a case similar to the one at bar, held that allegations in the answer that a certain assignment was fraudulent, and that the possession of the property involved never passed from the assignor to the plaintiff, presented material issues, and that it was error to strike them out of the pleading. In *Feeney v. Howard*, 79 Cal. 529; 12 Am. St. Rep. 162, the court says: "The facts constituting fraud must be averred in cases of constructive as well as of actual fraud." (See, also, *Golson v. Dunlap*, 73 Cal. 164; *Burt v. Wilson*, 28 Cal. 638.)

The appellants maintain that the court erred in refusing their application for leave to amend their answer in these respects so that the testimony of George Bickle could be introduced. We repeat our criticism of the unsatisfactory condition of the transcript, and are compelled to say that it does not appear that any amendments were ever prepared or submitted to the court below, or that good cause was shown therefor. We find no error in the record, and the judgment is affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

NEWELL ET AL., RESPONDENTS, v. MEYENDORFF, APPELLANT.

PUBLIC POLICY — *Contract in restraint of trade.* — Plaintiffs and defendant entered into a contract in which plaintiffs agreed that defendant was to have the sole and exclusive right of selling and dealing in a certain brand of cigars in Montana; that plaintiffs would not sell said cigars to any one else in Montana upon the consideration that defendant would cease advertising and selling other brands of cigars from which he was deriving profit, and that he would purchase said brand of cigars from plaintiffs, and would introduce and promote the sale thereof. *Held*, that the contract was not general, but was limited to place and person; that it did not deprive the public of the restricted party's industry, but was simply a contract for the enlistment of defendant's services as an agent, and was therefore not void as a contract in restraint of trade.

ESTOPPEL — *Party bound by the rulings of the court, which he obtains upon his own motion.* — In the case at bar, in an action brought by the plaintiffs for the purpose of recovering the price of certain cigars, defendant sought to recoup damages sustained to his business by a breach of the contract on the part of the plaintiffs. The court sustained a demurrer to the answer upon the ground that the contract was void as against public policy, being in restraint of trade. Defendant accepted the ruling, and amending his answer, pleaded the same contract as an absolute defense. Upon a trial the court found as a concession of law that the contract was not void, and rendered judgment for plaintiffs. *Held*, that plaintiffs having procured a ruling of the court that the contract was void, were bound by their theory of the case, and were estopped from receiving the benefit of the subsequent ruling to the effect that the contract was valid. *Held*, also, that the latter ruling of the court in construing the contract was correct; but when considered with the former ruling upon the demurrer, it deprived the defendant of a substantial right.

APPEAL — *Matters dehors the record.* — *Held*, that on an appeal this court is not precluded from examining the original answer and the sustaining of the demurrer thereto, for the purpose of ascertaining whether the court below in such decision, together with his subsequent reversal of his ruling in the same case, did not deprive the defendant of a substantial right, and exclude him from his day in court.

Appeal from First Judicial District, Lewis and Clarke County.

The case was tried before McCONNELL, C. J., without a jury.

J. B. Clayberg, for Appellant.

Plaintiffs were estopped from taking the position that the contract was valid after having procured the decision of the court that it was void. The rule is well settled that a party is not permitted to take inconsistent positions in court in the same suit. (*Smith v. Babcock*, 3 Sum. 584; *Ohio etc. Ry. Co. v. McCarthy*, 96 U. S. 258; *Philadelphia etc. Ry. Co. v. Howard*, 13 How. 307; *Avedando v. Gay*, 8 Wall. 376; *Bushnell v. Kennedy*, 9

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Wall. 387; *Irwin v. Miller*, 23 Ill. 401; *Braidwood v. Weiller*, 89 Ill. 606; *Belanger v. Hersey*, 90 Ill. 70; *Glover v. Benjamin*, 73 Ill. 42; *Hemphill v. Holly*, 4 Minn. 233; *Sweezy v. Stetson*, 67 Iowa, 481; *McQueen v. Gamble*, 33 Mich. 344; *Bean v. Macomber*, 35 Mich. 455; Bigelow on Estoppel, 601; 1 Herman on Estoppel, § 822.) Had the court power at a subsequent term to change its ruling upon this proposition, thereby depriving defendant of his defense of recoupment? The ruling of the court was the law of the case upon the point, until such ruling was reversed by a higher court. (*Kemper v. Town of Waverly*, 81 Ill. 278; Freeman on Judgments, §§ 15-23; *Exchange Bank v. Ford*, 7 Colo. 314; *Williams v. Hayes*, 68 Wis. 248; *Territory v. Christensen*, Dak. Jan. 31, 1887, 31 N. W. Rep. 847, and note; *Schobacher v. Germantown F. M. I. Co.* 59 Wis. 86; *Selz v. First Nat. Bank*, 60 Wis. 246; *Newman v. Newlon*, 14 Fed. Rep. 634; *Breed v. Ketchum*, 51 Wis. 164; *Bank of U. S. v. Moss*, 6 How. 31; *Jackson v. Ashton*, 10 Peters, 480; *Washington Bridge Co. v. Stewart*, 3 How. 413; *Cameron v. McRoberts*, 3 Wheat. 591; *Latimer v. Morrain*, 43 Wis. 107; *Wise v. Frey*, 9 Neb. 217; *Hansen v. Berquest*, 9 Neb. 269.) The court found as facts that the contract existed as claimed by defendant, and that the goods were purchased thereunder. If this contract was void as being contrary to public policy, and the goods were purchased under it, no recovery can be had upon it. There seems in the law to be two kinds of contracts which are void, and they are divided into two general classes, viz., contracts *malum in se* and contracts *malum prohibitum*, and there seems to be a wide distinction as to the rights of the parties under these two classes of contracts. In the first class of contracts, or those called *malum in se*, the parties are always considered in *in pari delicto* and *particeps criminis*, while in the contracts which are merely prohibited, no wrong is intended by either party, and there is no such thing as *particeps criminis*. In the first class of cases, the court has universally refused to aid the parties, but always leaves them where it finds them. In the second class of cases, the court will sometimes aid the parties; for example, the Statute of Frauds provide that all contracts which cannot be performed within one year shall be void. But as to contracts *malum in se*, Mr. Chief Justice Wilmot, in the case of *Collins v.*

Blantern, 2 Wils. 341, states the principle so clearly that it has been followed ever since. He says: "You shall not stipulate for iniquity. All writers upon our law agree in this. No polluted hand shall touch the pure fountain of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have help of a court to fetch it back again; you shall have no right of action when you come into a court of justice in this unclean manner."

The principles thus initiated by Mr. Chief Justice Wilmot have been followed from that day down to the present time, and while the rule may be stated in different ways by different judges, yet this is the substance of the entire principle. Out of it grew the maxim, *Ex turpi causa non oritur actio, et in pari delicto potior conditio defendantis*. (*Roll v. Raquet*, 4 Ohio, 400; *Miller v. Larson*, 19 Wis. 486; *Jerome v. Bigelow*, 66 Ill. 452; *Foster v. Thurston*, 11 Cush. 322; *Martin v. Wade*, 37 Cal. 168; *Knowlton v. Congress etc. Springs Co.* 57 N. Y. 518; *St. Louis etc. R. R. v. Mathers*, 71 Ill. 592; *King v. Brown*, 2 Hill, 485; *Peck v. Burr*, 10 N. Y. 294; *Saratoga Bank v. King*, 44 N. Y. 87; *Arnott v. Pittston Coal Co.* 68 N. Y. 558; *Gregg v. Wyman*, 4 Cush. 322; *Way v. Foster*, 1 Allen, 408; *King v. Green*, 6 Allen, 139; *Wight v. Rendskopf*, 43 Wis. 344; *Clarke v. Lincoln Lumber Co.* 59 Wis. 655.) The judgment must be reversed, even though this court should conclude that the last ruling of the court was correct on the validity of the contract, and that he had a right to change such ruling, for the reason that by such ruling defendant was deprived of a substantial right. If the contract was valid and the goods had been purchased under it, in an action for the value of the goods, defendant, under our statute, was entitled to recoup damages for a breach of the contract on the part of plaintiff. By the sustaining of the first demurrer and declaring the contract void, defendant was deprived of his right of recoupment. This was a substantial right, and under the circumstances the entire right was taken away. The plea of *res adjudicata* could be interposed to any original action for damages. The order became final as to him. If it also became final as to plaintiffs, defendant was not injured because he was left with a complete defense; but the

court having changed his ruling, it deprived defendant of all defenses, to which under the law he was entitled. The first ruling deprived him of his recoupment, but gave him another defense. The last ruling deprived him of this other defense, but under it he should have been entitled to his recoupment which had been already taken away.

Cullen & Sanders, for Respondents.

It is possible that the court was in error in sustaining the demurrer to the answer and amended answer of the defendant. But the defendant, instead of standing on his answer or his amended answer, filed a second amended answer upon which the case went to trial. When the second amended answer was filed it superseded the other two answers and they were no longer any part of the record in the case. So much of the transcript as shows these two answers, and the proceedings had thereon, should be stricken out, or, at least, not considered by the court. (*Brown v. Saratoga R. R. Co.* 18 N. Y. 495; *Gilman v. Cosgrove*, 22 Cal. 356; *Barber v. Reynolds*, 33 Cal. 501; *Jones v. Frost*, 28 Cal. 247; *Sands v. Culkins*, 30 How. Pr. 1; *Allen v. Compton*, 8 How. Pr. 251; *People v. Hunt*, 1 Idaho, 433; *Null v. Jones*, 5 Neb. 500; *Brown v. Galena Meth. Co.* 32 Kan. 528.) Conceding that the ruling of the court below was erroneous in sustaining the demurrers to the original and amended answers, the defendant did not take the proper course to avail himself of such error. He should have refused to amend, and upon judgment being rendered against him, he could have appealed to this court, and had whatever of error there was in the ruling corrected by the appellate court.

Instead of doing so he elected to change the posture of the case from that on which he deliberately chose to present it to the court, and thereby he waived the right to except to whatever there was of error in the ruling. (*Marden v. Wheelock*, 1 Mont. 49; *Orr v. Haskell*, 2 Mont. 225; *Perkins v. Davis*, 2 Mont. 474; *Collier v. Ervin*, 3 Mont. 142; *Francisco v. Benepe*, 6 Mont. 243; *Garver v. Lynde*, 7 Mont. 113; *Coit v. Waples*, 1 Minn. 134; *Becker v. Sandusky City Bank*, 1 Minn. 311; *Rees v. Leech*, 10 Iowa, 439; *Smith v. Cedar Falls R. R. Co.* 30 Iowa, 244; *Melhop v. Doane*, 31 Iowa, 416; *Philips v. Hosford*,

35 Iowa, 593; *City of Muscatine v. Keokuk etc. Packet Co.* 47 Iowa, 350; *Lane v. B. & S. W. R. R. Co.* 52 Iowa, 18; *Birby v. Blair*, 56 Iowa, 416.)

The record shows that this cause was tried on the first day of May, A. D. 1888, before Judge N. W. McCONNELL, sitting without a jury, and that he rendered the judgment which is appealed from in this action. It also shows that the statement on motion for a new trial was settled and allowed by Hon. HENRY N. BLAKE, his successor in office. The third subdivision of section 298 of our Code of Civil Procedure expressly provides that the statement shall be presented to "the judge who tried or heard the cause for settlement." The intention of the legislature is so clearly expressed in this section that there is little or no room for judicial construction. Our statute is taken from the amendment made to the Code of Civil Procedure of the State of California (see Hayne on New Trials, § 157, p. 468), and, unlike the Code of Civil Procedure of that State, it does not contain any provision for the settlement of it, in case the judge who tried the cause should die, resign, or become disqualified for any other reason. (See Hayne on New Trials, § 153, p. 447.) This question was raised in the case of *Edwards v. Tracy*, 2 Mont. 22, and it was there held that by the use of the word "judge" in the statute instead of "court," it authorized a settlement of a statement to be made in vacation, and that however many changes there might be as to the individual who held the office, yet there was no change in the office, and no vacation therein. It was therefore held that the successor in office of the judge who tried the cause was competent to settle a statement on motion for a new trial. This decision was made upon the statute as it stood in 1873, as it is found in the Codified Statutes of 1871-72, section 374, Civil Practice Act, and we respectfully submit that it is not a binding authority, or any authority, as the statute is now amended.

DE WITT, J.—The record in this case presents the following history: The complaint is for the price of cigars sold and delivered by plaintiffs to defendant. Defendant answered, and admitted the sale and delivery, and set up in recoupment a contract, the terms of which were, generally, that in 1886 he was dealing

in cigars; that plaintiffs approached him to sell their "Flor de B. Garcia Cigars," agreeing that defendant should have the sole and exclusive right of selling, handling, and dealing in said cigars in Montana; that plaintiffs would not sell said cigars to any one else in the Territory; that defendant would cease advertising and selling various other valuable brands of cigars in which he was dealing, and from the sale of which he was deriving much profit; that he would accept said sole agency, would purchase said brand of cigars from plaintiffs, and would introduce and promote the sale thereof to the best of his ability. The answer further alleges, in detail, the performance by defendant of his part of the contract, and the expenditure of large sums of money in placing said cigars upon the market. Then follows the allegation of breach by plaintiffs, in that they sold the said brand of cigars to other dealers in the Territory, by which breach the defendant suffered great damage in his business, which damage he recoups against the plaintiffs' account for the cigars sold. The court below sustained a demurrer to this answer on the ground that the contract pleaded was void as against public policy, being in restraint of trade, and could not be pleaded in recoupment. Defendant accepted the ruling of the court, and took leave to amend, which he did by pleading the same contract, not in recoupment, but as an absolute defense, on the ground that if the contract were void, the plaintiffs could not recover thereunder. The case went to trial in this condition, before the court without a jury. The theory of the case seems to have been preserved until the court made findings and conclusions of law, at which time he held that the contract was not void. Defendant presumably had not introduced evidence of damages by reason of breach, as he was not entitled to under the pleadings; and judgment was made and entered for plaintiffs for the amount claimed. Defendant seems not to have had a day in court. His motion for a new trial was denied. From that order, and the judgment as well, he appeals, having saved his errors complained of by exception.

We will first construe the contract as to whether it must be considered void as in restraint of trade. The rule that contracts that are in restraint of trade shall be void, as against public policy, is among our most ancient common-law inheritances. In *Alger v. Thatcher*, 19 Pick. 51; 31 Am. Dec. 119, Morton, J.,

says: "As early as the second year of Henry V. (A. D. 1415), we find by the year books, that this was considered to be old and settled law. Through a succession of decisions it has been handed down to us unquestioned, till the present time." The learned judge traces the history of the rule to its modern modification, that "contracts in restraint of trade, generally, have been held to be void; while those limited as to time or place or persons have been regarded as valid, and duly enforced." He gives the reasons for the rule in the following language: "(1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods, and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition, and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." (See, also, cases in that opinion cited.)

The doctrine is again well stated in *Lawrence v. Kidder*, 10 Barb. 641, in which case the court, Selden, J., cites with approval Bronson, J., in *Chappel v. Brookway*, 21 Wend. 157, as follows: "There may be cases where the contract is neither injurious to the public nor the obligor, and then the law makes an exception, and declares the agreement valid." In *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 68, Mr. Justice Bradley says: "There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting

himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration, and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

We have cited these reasons for the rule in full, in order to apply them to the contract under construction. They embody the modern doctrine, as held by the authorities. A recitation alone, of the rule and its reasons, seems to us sufficient to take the contract under consideration out of the operation of its prohibitions. The contract is not general; it is limited as to place and person. The public is not deprived of the alleged restricted party's industry. On the contrary, the contract provides for the placing upon the Montana market the product of the plaintiffs' industry, by the selection and services of a local Montana agent, interested in the success of sales, and to be rewarded by such success. Nor is there any injury to the party himself, the plaintiffs, by their being precluded from pursuing their occupation. Rather, by the contract, they seem to have sought a means of extending the field of their operations, and not of restricting them. In the light of the authorities, the rule and the reasons therefor, and the facts, we are clearly of the opinion that the contract was not in restraint of trade, and not void. It was simply a contract, for a consideration, for the enlistment of the services of an agent for the plaintiffs in their business. The court below was therefore correct in his last view of the contract. It follows that he was wrong in his first position in sustaining the demurrer to the original answer.

Respondent urges that all the proceedings and pleadings, prior to the amended pleadings, on which the case was tried, are *dehors* the case on appeal; citing Sawyer, J., in *Barber v. Reynolds*, 33 Cal. 501: "The old complaint, in the form first filed, ceases to be the complaint in the case, or to perform any further function as a pleading, but the amended complaint falls

into its place, and performs the same, and not different functions." Upon an examination of this case, we find the judge further saying: "The identity of the action is in no respect affected;" and it was preliminary to arriving at the conclusion last quoted that the previous utterance was made. The law, as counsel cites it, is true, as far as he goes. The old answer in the case at bar does not "perform any further function as a pleading;" but we are not precluded from examining that answer, and the sustaining of the demurrer thereto, for the purpose suggested *infra*. We are mindful of the consequences of defendant answering over, after demurrer sustained (*Francisco v. Benepe*, 6 Mont. 243), and we, at this time, recur to that ruling, and review the same, not as if an appeal had been taken therefrom to this court, but for the purpose of ascertaining whether the court in such decision, together with his latter reversal of his position, in the same case, did not deprive defendant of a substantial right, and exclude him from his day in court. If that be true, defendant has a remedy. *Ubi jus, ibi remedium*. If the contract be valid, defendant certainly has the right to recoup his damages. If the contract be void, defendant has the right to plead it in bar. But the court below changed front as often as defendant aligned himself with the court's last evolution. It was impossible for the defendant to keep pace with the movements of the court, who finally left him a judgment debtor, after having twice declared that he had a good defense, but each time when the court had placed defendant in a position where he could not avail himself of such defense. For the defendant's disasters, thus resulting, there must be a remedy. We find it as follows: A party in an action is bound by his pleadings. He is also bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error. (2 Herman on Estoppel, § 823, and note.) A party is bound by his theory and presentation of his case. "A party cannot get relief on one basis, and then seek a new chance to litigate, on the suggestion that he has a defense, which he did not see fit to rely on before." (*Beam v. Macomber*, 35 Mich. 457. See, also, *Belanger v. Hersey*, 90 Ill. 73; *Swezey v. Stetson*, 67 Iowa, 481.) "Where a party gives a reason for his conduct and decision touching anything

involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (*Ohio etc. Ry. Co. v. McCarthy*, 96 U. S. 267. See, also, *Dreyfous v. Adams*, 48 Cal. 131; *Long v. Fox*, 100 Ill. 43; *McQueen v. Gamble*, 33 Mich. 344; *Cullaway v. Johnson*, 51 Mo. 33; *Edwards' Appeal*, 105 Pa. St. 103.)

When the plaintiffs in the case at bar had procured the ruling of the court that the contract was void, they placed their theory of the case upon record. Might they then, "upon after-thoughts, new suggestions, and new aspects of the case, change their position of the case from that on which they deliberately chose originally to present it to the court?" and especially after defendant had accepted the construction of the contract, demanded by plaintiffs, and held by the court. Plaintiffs were estopped by the position they had assumed, and into which they had forced defendant, when, to change that position, in the time and in the manner that it was changed, deprived defendant of all defense whatsoever. The decision of the court holding the contract valid was made after the testimony was closed and the case argued and submitted, and submitted on pleadings which forbade evidence in recoupment. If the court had made his reformed ruling before the close of the case, defendant could have obtained leave to amend himself back to his original position, and obtain a continuance on the ground of surprise, if necessary, to enable him to obtain and produce his evidence of damages. It would seem that the action of the court was accident and surprise, against which no ordinary prudence could have guarded. We are of opinion that plaintiffs were estopped from asserting that the contract was valid, or of receiving the benefit of the ruling of the court to that effect, when such ruling came at the time, in the manner, and under the circumstances that it did, and to the total deprivation to the defendant of his defense to the action. Therefore the latter ruling of the court, although correct by construing the contract, under the circumstances described, and entailing the results that it did, and taken with the former position assumed by the court, and depriving defendant of a substantial right, was error.

We make no reflection upon the distinguished judge who tried the cause. His reformation of his first opinion is a credit as well to his eminent and conceded ability as to his known sense of justice and probity. His action complained of was more in the nature of a misfortune, which happened to be fatal to the defendant.

Respondent urges that the statement on motion for a new trial cannot be considered, as it was not settled by the judge who tried the case, but by his successor in office. It is not necessary to consider this objection, as the *data* for our conclusion are all found in the judgment roll, and the appeal is from the judgment, as well as the order denying the motion. We cannot leave this case without animadverting upon the record as it is presented. This court has heretofore had occasion to remind counsel that the preparation of a record is their duty, and it is not for them to leave the Supreme Court to grope through a disorderly mass of immaterial matter to ascertain that which counsel relies upon. (*Upton v. Larkin*, 7 Mont. 462; *Raymond v. Thexton*, 7 Mont. 305; *Fant v. Tandy*, 7 Mont. 443; *Sherman v. Higgins*, 7 Mont. 479.) In the record in this case, the complaint, second amended complaint, replication, judgment, notice of motion, and specification of errors all appear twice in full, instead of being once inserted, and afterwards noticed by appropriate reference. Where reference is made, pages are omitted. It is difficult to refer to page ——. The matter is not presented in that orderly, systematic, chronological method that presents to the court an intelligent view of the case at a reading. When we do arrive at the gist of the matter, it is after such labor as caused the learned compilers of the Institutes of Justinian to say, in the dedication of that work, *et opus desperatum, quasi per medium profundum euntes coelesti favore ad implevimus*. The judgment is reversed, and the cause remanded for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

GAGE, RESPONDENT, v. MARYATT, APPELLANT.

9	265
13	225
23*	387
33*	1014

JUSTICE'S COURT—Practice—Waiver of defective summons by appeal.—The defendant appealed to the District Court from a judgment by default rendered against him in a Justice's Court, and appearing specially, moved to dismiss the action upon the ground of a defective summons. *Held*, that the defendant having appeared generally in taking his appeal, thereby waived the irregularities in the summons, and could not subsequently appear specially for the purpose of a motion to dismiss.

9	265
19	511

9	265
21	457

9	265
22	402

SAME—Appeal—Trial de novo.—Under section 826 of the Code of Civil Procedure, providing that "all appeals from Justices' Courts shall be tried anew in the District Court on the papers filed in the Justice's Court," a judgment by default will be affirmed, on appeal, where no motion was made in the Justice's Court to set aside the default, or other appropriate relief sought; the complaint being sufficient for the court in which it was originally filed.

Appeal from Third Judicial District, Gallatin County.

The judgment was rendered by LIDDELL, J.

J. A. Staats, for Appellant.

Luce & Luce, for Respondent.

BLAKE, C. J.—This action was commenced in the Justice's Court of Gallatin County by Gage, to recover from Maryatt the sum of fifteen dollars, and for the return of a bull, or eighty-five dollars, its value. These matters are stated in the summons, and also the following notification: "That if you fail to appear and answer said complaint, as above required, the said plaintiff will take a judgment by default against you for the sum of one hundred dollars, if a delivery cannot be had, and costs of suit." The summons was served personally upon Maryatt, who did not appear, and his default was entered. Afterwards, witnesses were called and testified, and judgment was entered according to the prayer of the complaint.

Maryatt then appealed to the District Court, and appeared specially, and moved to dismiss the case for these reasons: That the Justice's Court had no jurisdiction of the person of the defendant, because the summons "does not state the nature of the action sufficiently explicit to apprise defendant thereof," and also that the summons "does not comply with the statute providing for notice to apprise defendant what judgment plaintiff will take if default is entered in said action." The court over-

ruled the motion, and affirmed the judgment of the Justice's Court; and from this action Maryatt appealed.

We do not intend to determine all the questions relating to the summons which have been raised by the appellant, but can say that the defendant was apprised, in general terms, of the nature of the claim of the plaintiff against him, and there was a partial compliance with the Code of Civil Procedure, section 742. But the irregularities in the summons were waived by Maryatt when he voluntarily appealed the case to the District Court. In *Lowe v. Stringham*, 14 Wis. 244, Mr. Judge Paine says: "The object of an appeal, in such cases, is to try the case anew in the appellate court, on its merits, and not to review errors of the justice. The taking of such an appeal is equivalent to an appearance, and gives the appellate court jurisdiction over the person, whether the service of the process before the justice was sufficient for that purpose or not." In *Fee v. Big Sandy Iron Co.* 13 Ohio St. 564, the court says: "The service in the present case is not shown to be in conformity to the Code. . . . The common pleas, therefore, did not, by the return upon the summons, acquire jurisdiction over the defendant. But the corporation, by appearing in court, and causing notice of its intention to appeal from the judgment to be entered upon the record, thereby appeared in the action, and submitted itself to the jurisdiction of the court, and cannot now be permitted, on error, to allege a want of jurisdiction in the court." (*Marsden v. Soper*, 11 Ohio St. 503; *Barnum v. Fitzpatrick*, 11 Wis. 81; *Blackwood v. Jones*, 27 Wis. 498; *Perry v. McKinzie*, 4 Tex. 154; *Matone v. Clark*, 2 Hill, 658.) The court rightfully overruled the motion to dismiss the action. The appellant, having appeared generally in taking his appeal, could not subsequently appear specially, for the purpose of making the motion of dismissal.

The Code of Civil Procedure provides that "all appeals from Justices' Courts shall be tried anew in the District Court, on the papers filed in the Justice's Court. . . ." (§ 826.) In *Martin v. District Court*, 13 Nev. 90, Mr. Justice Beatty says: "All the District Court can do, in a case appealed from a Justice's Court, is to try it anew (Comp. Laws, § 1643), and, if no sort of issue has been made or tried in the Justice's Court, there is

nothing to be tried anew." (*People v. County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 661.) The authorities are uniform in holding that the appellant should have appeared and answered in the Justice's Court, or moved to set aside the default, or sought other appropriate relief. In this way the issues could have been settled, and upon an appeal there could be a new trial.

When, however, the case was within the jurisdiction of the District Court, the appellant made no effort to procure an adjustment of his rights by seeking any redress, but placed that tribunal in this position, that it must affirm or reverse the judgment of the Justice's Court. The complaint is not technically correct, but it is sufficient for the court in which it was originally filed, and where great liberality is allowed in formal matters. The court below was therefore compelled to affirm the judgment of the Justice's Court. It is therefore adjudged that the judgment be affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

LEWIS DAVIS, RESPONDENT, v. JOSEPH DAVIS AND
BENNETT PRICE, APPELLANTS.

PLEADING — Counter-claim — Attorney in fact. — Defendant, Joseph Davis, who was the attorney in fact of the plaintiff, conveyed by virtue of such agency certain property belonging to the plaintiff to his co-defendant, who in turn reconveyed it to the defendant. In an action to annul the conveyances the defendant pleaded as a separate defense that the premises in controversy were purchased by the plaintiff, defendant, and another; that defendant supplied the money to pay for his share; that the deed was taken in the name of the plaintiff alone; that at the time of and prior to the acts complained of, the legal title to such share was in the plaintiff, but that there was a resulting trust in favor of the defendant, and that defendant had an equitable title to said share in the premises when the power of attorney was made to him. *Held*, that this defense was a good original cause of action in defendant's favor against the plaintiff if defendant sought a reconveyance of that share from the plaintiff, and was properly set up in the answer under the provisions of sections 89 and 90, chapter 4, Code of Civil Procedure. *Held, also*, that the acceptance by the defendant of the power of attorney, and his actions under it, did not deprive him of this cause of action, whether set up in an original action, or as an equitable defense in the case at bar against the plaintiff. *Quære*, under section 91, chapter 4, Code of Civil Procedure, must he not set it up or be afterwards barred from asserting it?

9	267
11	566

9	267
15	188
23*	715
38*	828

9	267
18	517

9	267
31	514

9	267
31	308

ESTOPPEL — Conveyances by attorney in fact to himself. — An attorney in fact, who, by advantage of his agency, conveys the legal title of the land of his principal to himself, is not thereby estopped from asserting a prior equitable title in himself in an action by the principal to annul the conveyance.

PRAYER NOT CONCLUSIVE — Equity pleading. — Where the defendant pleads new matter in the answer as a defense, praying to be discharged, he is not concluded thereby from obtaining such relief as he shows himself entitled to. (Cases of *Gillett v. Clark*, 6 Mont. 191; *Leopold v. Silberman*, 7 Mont. 263, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

Plaintiff's motion for judgment on the pleadings was sustained by BLAKE, C. J.

Massena Bullard, and Carpenter, Buck & Hunt, for Appellants.

Where, upon foreclosure of property, title is taken in the name of one, but the consideration is paid by another, a resulting trust arises. (Perry on Trusts, § 126; Story on Equity Jurisprudence, § 1201.) If a joint purchase is made in the name of one, and another pays his share of the purchase money, the latter will be entitled to his share of the property as a resulting trust. (Story on Equity Jurisprudence, § 1206; *Buck v. Swazey*, 35 Me. 49; 56 Am. Dec. 681; Wood on Statute of Frauds, § 456; *Edwards v. Edwards*, 39 Pa. St. 369.) Where part of the purchase price is paid by one, and the title is taken in the name of another, there is a resulting trust *pro tanto*. (4 Kent Com. 306; *Lonebury v. Purdy*, 18 N. Y. 515; *Sayre v. Townsends*, 15 Wend. 647; *Learned v. Haley*, 34 Cal. 608.) A trust results when land is purchased by one brother in the name of another. (Hill on Trustees, p. 98; Perry on Trusts, § 144.)

A court of equity will not set aside the deeds, if Joseph Davis was the owner of the property, or if plaintiff held the property in trust for him. There was a consideration for the deeds when the money was paid by Joseph Davis and the title taken in plaintiff. The court should not set aside the deeds unless equity is done by plaintiff. It is the duty of plaintiff to convey the trust property. (Story on Equity Jurisprudence, § 693; Willard's Equity Jurisprudence, § 302.) A void deed will not be set aside by a court of equity unless equity is done by the party seeking a cancellation. (*Canfield v. Fairbanks*, 63 Barb. 461.) The deeds sought to be canceled are not absolutely

void. (*Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631.) All of the facts necessary to constitute a defense, and to entitle the defendant, Joseph Davis, to equitable relief, are set forth in the answer; and if these facts are true a court of equity should not direct the cancellation of the deeds, but on the contrary should render a decree establishing the defendant's title against the plaintiff.

Oullen & Sanders, for Respondent.

Where an agent, holding a power of attorney to sell, becomes the purchaser himself, the sale will be set aside on the application of the principal. An agent, by accepting a power of attorney to sell real estate, is thereby estopped from denying the title of his principal. (2 Pomeroy's Equity Jurisprudence, § 559, and notes; *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611-614, and notes; *Frink v. Roe*, 70 Cal. 296; 2 Herman on Estoppel, §§ 887-890; *Willison v. Watkins*, 3 Peters, 43-48; *Morrell v. Cone*, 22 How. 75; *Mott v. Smith*, 16 Cal. 536-557; *Borell v. Rollins*, 33 Cal. 409; *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; Mechem on Agency, § 326; *Meade v. Brothers*, 28 Wis. 689-693; *Michoud v. Girod*, 4 How. 503, 553.) It is admitted by the pleadings in this case that the appellant accepted the trust created by the power of attorney given him by the respondent; that, without consideration, and for the sole purpose of having the property mentioned in the complaint conveyed to him, he conveyed it to one Bennett Price, who in turn reconveyed it without any consideration to the appellant. It is manifest that the appellant is in no better position than if he, as the attorney in fact of Lewis Davis, had assumed to convey it directly to himself. (*Bain v. Brown*, 56 N. Y. 288; 1 Story on Equity Jurisprudence, § 316, and cases there cited; *Cuse v. Carroll*, 34 N. Y. 388; *Hill v. Frazier*, 22 Pa. St. 320; *Smeltzer v. Lombard*, 57 Iowa, 294; *Gilman etc. R. R. Co. v. Kelly*, 77 Ill. 426; *Davis v. Hamlin*, 108 Ill. 39; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.) In *Wilbur v. Lynde*, 49 Cal. 290, it is held that such a contract is contrary to public policy and void for that reason. The admissions made by the answer show that the deeds which

passed between Joseph Davis and Bennett Price were void. The whole object of the action is to have them so declared, and when that fact appears from the pleadings the court will not stop to inquire what are the equities between them. (*McKay v. Williams*, 67 Mich. 547; 11 Am. St. Rep. 597.)

Brief of appellants in reply.

The court will inquire into the equities between the parties, in any action in which the defense is connected with the subject-matter set forth in the complaint. (1 Pomeroy's Equity Jurisprudence, §§ 84, 85, 86; *Crary v. Goodman*, 12 N. Y. 266; *Dobson v. Pearce*, 12 N. Y. 156; *Burgett v. Bissell*, 5 How. Pr. 192; *Bruck v. Tucker*, 42 Cal. 346; *Gates v. Salmon*, 44 Cal. 382.) A court of equity will deny relief to any one without clean hands, or not doing equity. (1 Pomeroy's Equity Jurisprudence, 385, 392, et seq.; *Creath's Adm'r v. Sims*, 5 How. 204; *Livingston v. Harris*, 3 Paige, 528, 537; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Mumford v. American etc. Ins. Co.* 4 N. Y. 453; *Comstock v. Johnston*, 46 N. Y. 615; *Guttenberger v. Woods*, 51 Cal. 523; *Pujol v. McKinlay*, 42 Cal. 560; *Evans v. Folsom*, 5 Minn. 432; *Dugan v. Colville*, 8 Tex. 126.) It is not claimed by respondent ~~that said~~ Joseph Davis has acquired title to an inch of land that belongs to Lewis Davis or any other person. Simply an exploded technical legal doctrine is sought to be interposed to defeat a substantial right. No similar case can be found under code practice where an equitable defense has been excluded. Equity rejects any and every legal estoppel that prevents an ascertainment of the truth. (Perry on Trusts, § 416.) Equity does not relieve against fraud from which no damage results. (*Jewett v. Davis*, 10 Allen, 68.) It would be inequitable and unjust to require the appellant to bring another action to enforce rights that may be properly adjudicated in the action now before this court.

DE WITT, J.—The complaint alleges that on the first day of December, 1882, plaintiff, being about to leave Montana, gave to the defendant, Joseph Davis, a power of attorney, authorizing him to sell and convey the real estate of plaintiff in Lewis and Clarke County, said Territory. The plaintiff was then the

owner of several described tracts of real estate in said county. The power of attorney was duly recorded February 2, 1885. On February 20, 1885, the defendant, contriving to cheat plaintiff, and without consideration, conveyed said premises by two deeds to defendant, Bennett Price. Those deeds were executed, "Lewis Davis, by Joseph Davis, his attorney in fact." They were acknowledged and recorded. That, in furtherance of defendant's purpose to defraud plaintiff, said Price, on February 21, 1885, without consideration, conveyed said premises to Joseph Davis. The deeds are all pleaded in the complaint. That said transactions between Joseph Davis and Price were fraudulent and void. Plaintiff prays that all said deeds be declared void, and that the title to the premises be adjudged to be in the plaintiff.

The answer contains some denials, which we need not consider in this decision. It then sets forth a separate defense, separately stated, which may be substantially stated, with the legal effect claimed, as follows: That the premises in controversy, or so much thereof as is necessary to notice in this consideration, were originally purchased by Lewis Davis, Joseph Davis, and another. That Joseph supplied the money to pay for his share in the same. That the deed was taken in the name of Lewis alone. That consequently, at the time of and prior to the acts complained of in the complaint, the legal title was in Lewis, but that there was a resulting trust created in favor of Joseph, and that Joseph had an equitable title in the premises when the power of attorney was made to him, and when he made the transfers complained of. It appears that Joseph, by the circumambulation through Bennett Price, as attorney in fact for Lewis, conveyed to himself, Joseph, the premises, in which, as appears by his answer, he claims he had the equitable title by virtue of the resulting trust suggested.

There was no replication. Plaintiff moved for judgment on the pleadings, "for the reason that the answer filed by the defendants does not present any sufficient defense to the cause of action set up in the plaintiff's complaint." The motion was granted, and judgment entered accordingly. From that judgment this appeal is taken.

We are to determine whether the new matter in the answer

constituted a defense which could be presented in this action. The complaint is in equity. The new matter, if it be a defense, is an equitable one. For the purposes of this decision, we take the new matter as true, and, for convenience of treatment, will hereinafter speak of it as facts, and not merely allegations. Joseph Davis, by the power of attorney, was constituted the agent of Lewis Davis. He was in a fiduciary relation. Before the power of attorney was given, the legal title being in Lewis and the resulting trust existing, and the equitable title being in Joseph, Lewis was in a fiduciary capacity as to Joseph.

We will not cite authorities upon the general rule of equity, that an agent shall not unite his personal and representative capacities in the same transaction; that he shall not deal with himself; that an agent to sell for his principal shall not himself become the buyer, directly or indirectly; that an agent to buy for his principal shall not himself be the seller. These general doctrines are as old as the court of chancery.

Respondent urges that the conveyances from Joseph, agent, to Joseph personally (for the mediation of Bennett Price is not material), must be set aside under the equitable rules cited. The lower court so held, and on that view gave judgment. The opinion on file bases the decision upon those doctrines.

We are of opinion, however, that there is another step in the case, another view of the situation of the parties as being in a court of equity, to which the attention of the District Court was not invited, and the opinion of that court does not treat of the subject which we will now discuss. Chapter 4, Code of Civil Procedure, provides: "Sec. 89. The answer of the defendant shall contain: *Second*, a statement of any new matter constituting a defense or counter-claim. Sec. 90. The counter-claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action arising out of one of the following causes of action: *First*, a cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense, or connected with the subject of the action. Sec. 91. If the defendant omit to set up a counter-claim in the cases mentioned in the first subdivision of the last section,

neither he nor his assignee can afterwards maintain an action against the plaintiff therefor. . . . The defendant may set forth, by answer, as many defenses and counter-claims as he may have," etc.

Was defendant's new matter a defense or counter-claim, and, if so, under the provisions of the Code of Civil Procedure, *supra*, and by the rules of equity practice, may it be set up in the answer in the case? If so, judgment should not have been against the defendant on the pleadings, and the case should go back to the District Court for a determination of the equities. The subject suggests the following order of discussion:—

1. Is the new matter in the answer such that, if it were set forth in an original complaint in an action in equity, it would be entertained as entitling defendant to relief in such court? That is to say, if a plaintiff in a bill in equity allege that he furnished money to defendant to purchase land for him, that defendant purchased the land with the money, and took a deed to himself alone, either with or without plaintiff's consent, do these facts entitle plaintiff to equitable relief? The authorities are uniform that they do. (Perry on Trusts, ch. 5; Story on Equity Jurisprudence, §§ 1201, 1206; *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681; Wood on Statute of Frauds, § 456; *Edwards v. Edwards*, 39 Pa. St. 369.) The defendant's new matter is a good original cause of action in his favor against the plaintiff.

2. The defendant, Joseph Davis, having such original cause of action before the power of attorney was given to him by plaintiff, Lewis Davis, does the execution by Lewis Davis of such power of attorney deprive Joseph of his cause of action described? In other words, if such cause of action was put into a complaint by Joseph against Lewis, could Lewis defend by alleging the giving of the said power of attorney? It is *reductio ad absurdum*. The question answers itself in the negative.

3. Again, did the acceptance by Joseph of said power of attorney deprive him of such above-described cause of action? Because he consented to act for Lewis as his agent in the caring for and disposition of the lands of Lewis, and also the lands of which the legal title was in Lewis and the equitable one in Joseph, does this consent, this acceptance of an agency, debar

Joseph from demanding in a proper action and court rights which existed and were undisputed before the agency was created? Joseph Davis, having the cause of action set forth in paragraph 1, *supra*, could not be cut out of it by accepting the agency conferred by the power of attorney by any principle of law of which we are aware.

4. Again, after the power of attorney was given by Lewis and accepted by Joseph, did Joseph's acts, under the power of attorney complained of in the complaint herein, deprive him of his cause of action above described? Counsel for respondent quote the equity maxims, "He who seeks equity must do equity;" "He who comes into a court of equity must come with clean hands;" and argues that, because Joseph Davis took his own land and kept it, when it came into his own hands, by virtue of the creation of the agency by the power of attorney, he cannot be heard to assert his equitable right thereto at this time.

We must distinguish here between the state of facts in the case at bar and another one that might exist. Joseph obtained the power of attorney rightfully. It was the voluntary act of Lewis. The *fiducium* was mutual. Lewis held Joseph's title in trust for him. Joseph took Lewis' power of attorney as a trust. On the other hand, if Joseph had obtained such power of attorney wrongfully—to illustrate it strongly, by actual violence, or duress *per minas*—and, after it were so obtained, by the authority thereof had conveyed the land to himself, and then had acquired an equitable title thereto, a court of equity would hesitate to hear him, and might then apply the maxim, "He who comes into a court of equity must come with clean hands."

But the only proposition before us is, when Joseph was given by Lewis dominion over the land belonging to Lewis in law, and to Joseph in equity, and Joseph undertook, by the advantage of his agency to procure to himself the legal title, when he already held the equitable one, was that attempt of such a nature that the law visits the penalty of estopping Joseph from afterwards asserting that equitable title? The question is not now whether that attempt succeeded from a legal point of view, or whether Joseph obtained the legal title by his maneuvers, but whether he has so conducted himself that he has lost his equity. The result could only occur through the operation of the rules

of estoppel. Those rules are too familiar to require recitation. It is clear that their application to the facts under discussion cannot work an estoppel against Joseph Davis. (See Perry on Trusts, § 416.)

5. We therefore arrive at the conclusion that, prior to the time when the obnoxious deeds were made, an affirmative cause of action existed in favor of Joseph and against Lewis as above fully described, and that when the action was commenced Joseph had not lost the right to set up that cause of action, and that the facts constituting the same are pleaded as new matter in the answer.

6. Such new matter would constitute a defense or counter-claim. (Code Civ. Proc. §§ 89, 90.) Defendant alleges it in the form of a defense. The prayer of the answer is that defendant be discharged. But the prayer in an equity action does not conclude the pleader. (*Gillett v. Clark*, 6 Mont. 191; *Leopold v. Silverman*, 7 Mont. 266.) The court may grant such relief as the party shows himself entitled to. The allegations in the new matter are sufficient for a counter-claim, on which the court could enter a decree adjudging the title to be in Joseph Davis, if it were deemed that the dismissal of the action, as prayed for in the answer, were not a sufficient confirmation of defendant's title.

7. Such new matter is "connected with the subject of the action." It is inseparably connected with the question of the title to the premises. The title to the premises is the subject of the action.

8. Defendant may set up such new matter in his answer. (Code Civ. Proc. §§ 89, 90.)

9. *Quære*, must he not set it up, or be afterwards barred from asserting it? (Code Civ. Proc. § 91.)

10. Under the rules of practice in a court of equity, the court will hear an equitable defense or counter-claim, connected with the subject-matter of the petition, without regard to the provisions of the Code of Civil Procedure above cited. (1 Pomeroy's Equity Jurisprudence, § 84, et seq.; *Crary v. Goodman*, 12 N. Y. 266; *Dobson v. Pearce*, 12 N. Y. 156; *Bruck v. Tucker*, 42 Cal. 346.)

11. It is a settled rule of equity practice that when the court

has before it all the parties to any difference, and when it has obtained complete jurisdiction of the whole subject-matter, it will finally settle the whole controversy. "The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable." (*Polk's Lessee v. Wendal*, 9 Cranch, 87.) The court, in the case before us, has, with the new matter in the answer, the ample purview contemplated by the rules of equity. It has the whole controversy and all the parties before it. Final adjudication of all the claims of Lewis Davis and Joseph Davis in the premises may be and should be made in one decree, *ut sit finis litium*. The judgment of the District Court, so far as it affects the validity of the deeds from Joseph Davis, as attorney in fact to Bennett Price, and the deeds from Bennett Price to Joseph Davis, is affirmed; but the cause is remanded, with directions to the District Court to entertain the equitable claim of defendant set up in his answer, and to hear and determine the claims of the parties in and to the premises in controversy.

HARWOOD, J., concurs.

BLAKE, C. J., did not sit in the case, having been trial judge in the court below.

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d25 270

WULF, RESPONDENT, v. MANUEL, APPELLANT.

PRACTICE—*Statement on motion for new trial—Proof of service.*—Where it appeared from an affidavit of defendant's attorney that a statement on motion for a new trial was served by leaving the original with the plaintiff's attorneys, who, after retaining it for three days, returned it to defendant's attorney, by whom it was then filed with the clerk of the court and afterwards settled by the judge. *Held*, that the service was good, and that the proof of such service was properly made by the evidence of the person serving the same.

SAME—*Notice of settlement of statement on motion for a new trial.*—A statement on motion for a new trial may be settled by the judge without notice to the adverse party, when no amendments have been filed within the time allowed by law.

SAME—*Hearing of motion without notice.*—A motion for a new trial made by defendant was heard and refused in the absence of plaintiff or his attorneys, and without notice. *Held*, that as the disposition of the motion was favorable to plaintiff there was no error of which he could complain.

SAME—*Motion to strike from the transcript.*—A motion to strike from the transcript a statement on appeal, based upon the objection that the statement is not engrossed and the contents not arranged in chronological order, will be denied where the only offense is an inartistic arrangement of the matters contained therein.

On motion to strike from the transcript the statement on appeal.

Wade, Toole & Wallace, for the motion.

McConnell & Clayberg, contra.

DE WITT, J. — The case is before us upon respondent's motion to strike from the transcript the statement on appeal. The statement on appeal contains, as a portion thereof, a statement on motion for a new trial. It is at the latter statement as it appears in the former that the motion is particularly directed. The judgment below was for plaintiff. Defendant made a motion for a new trial. The motion was denied. Defendant appeals.

A statement on motion for a new trial appears to have been settled by the district judge. In the statement on appeal appears the respondent's objections to the former statement, which objections he urges as follows:—

1. That the statement on motion for a new trial does not bear thereon any evidence of service of any copy of any statement on motion for new trial, nor notice thereof, either upon the plaintiff or his attorney; nor is there indorsed thereon any acceptance of service of the statement, copy, or notice. We hold that this objection is not well founded. The statement was settled by the district judge, October 25, 1889. On that day it appears that there was before the judge on file in the case an affidavit of N. W. McConnell, one of appellant's attorneys, dated July 26, 1889, which sets forth in detail that on June 29, 1889, he served upon D. S. Wade, one of respondent's attorneys, the statement by then leaving the original with him; that July 2d one of respondent's attorneys returned the statement to affiant, who then filed it with the clerk of the court. This was a good service. The law provides that the moving party must prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. (Subd. 3, § 298, Code Civ. Proc.) The proof of such service was equally good. It is naturally made by the evidence of the person serving the paper. Such proof was made by a lengthy affidavit of such person, and was before the judge on making the settlement. An acceptance of service, indorsed upon a paper, relieves the party wishing to prove the fact from so

doing. It would be a monstrous practice if the party on whom service was made could refuse or neglect to admit service in writing on the paper, and then claim that no service could be made to appear by evidence.

2. The respondent objects that the statement on motion for a new trial was settled by the court, in the absence of the plaintiff and his attorneys, and without any notice of its settlement to either of them. The statute is clear upon this subject. The respondent was not entitled to any notice of the settlement, for the reason that he had filed no amendments to the proposed statement. "If no amendments are served within the time designated, . . . the proposed statement . . . may be presented to the judge or referee for settlement, without notice to the adverse party." (Subd. 3, § 298, Code Civ. Proc.)

3. Respondent complains that the motion for a new trial was heard and disposed of in the absence of plaintiff and his attorneys, and without notice to them. This seems to be the fact. But the respondent cannot complain. The disposition of the motion was in his favor; that is, it was denied. It does not appear that the respondent was injured by the action of the court in sustaining the judgment heretofore rendered in his favor. If his absence had any effect, it seems to have redounded to his advantage. He cannot complain of this.

4. The respondent further complains that the statement on motion for a new trial was settled and allowed, when there was pending and undisposed of what he calls a motion to strike the statement from the files. On July 22d respondent filed the following: "Now comes the plaintiff and moves the court to strike from the files in the above-entitled action the so-called statement on motion for a new trial, and the paper so designated therein, filed, etc., for that there is no proof of a service of a copy thereof upon the plaintiff or his attorney, and for that there was never any service of a copy thereof upon plaintiff or his attorneys, or any waiver thereof, or acceptance thereof, or any service, or waiver of acceptance of service, by plaintiff or his attorneys, or any notice of filing the same." Signed by plaintiff's attorneys. Also, on the same day the following: "To Messrs. McConnell, Carter & Clayberg, atty's for deft.: You will please take notice of plaintiff's motion to strike from the files the so-called state-

ment on motion for new trial filed therein on the second day of July, 1889." Signed by plaintiff's attorneys. Service admitted by defendant's attorneys. There was filed with the above nothing whatever in support of the recitals therein. It must be presumed that plaintiff relied upon the record. Without passing upon whether the above papers constituted a motion under the provisions of sections 482-484 of the Code of Civil Procedure, it is sufficient here-to say that the alleged want of proof or service of statement was amply supplied by the McConnell affidavit, July 26th, which was on file three months before the settlement of the statement, was before the judge on such settlement, and was uncontroverted by any evidence whatever. This matter we have disposed of (paragraph 1, *supra*).

5. Respondent also objects to the form of the statement on appeal, that it is not engrossed, and the matters not in chronological order. The only offense in this respect is that the amendments are placed together at the end of the statement. Such may be the chronological order in which events occurred. The arrangement is inartistic and awkward, but not a transgression of the rule which we think justifies us striking out the whole statement. It is our opinion that the motion should be denied, and it is so ordered.

HARWOOD, J., concurs.

BLAKE, C. J., did not sit in the case, having acted as district judge in the trial below.

WULF, RESPONDENT, v. MANUEL, APPELLANT.

MINING CLAIM — Title through alien — Nonsuit. — On the trial of an action between two claimants of a mining claim upon the lands of the United States, a motion for a nonsuit was made by the defendant upon the ground that the plaintiff deraigned title through one M., an alien. The defendant's answer alleged the citizenship of M., which was admitted by plaintiff. *Held*, that the defendant was bound by his answer, and the nonsuit was properly denied.

SAME — Aliens — Retroactive effect of naturalization. — The defendant at the time of his purchase of the mining claim in controversy, and at the time of his application to the United States for a patent, was an alien, but was made a citizen on the day of the trial. *Held*, that under the law only citizens of the United States, and those who have declared their intentions to become such, can apply

9	279
9	286
11	445
11	446

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15	249
23*	723
33*	1076

9	279
123	415

to purchase the mineral lands of the government, and that as such lands are not open to exploration, occupation, or purchase by aliens, the defendant's act of naturalization could not retroact to his purchase or possessory right to a mining claim upon the public domain.

Appeal from First Judicial District, Lewis and Clarke County.

The cause was tried before BLAKE, C. J.

McConnell & Clayberg, for Appellant. , .

The appellant insists that the court erred: *First*, in nonsuiting him upon his cross-complaint. *Second*, in refusing to nonsuit the plaintiff.

After the appellant was naturalized his status was that of a citizen, and such naturalization had a retroactive effect, and became a waiver of all liability of forfeiture and a confirmation of his former title, and entitled him to a recognition in court as a naturalized citizen, the same as if he had been naturalized before the suit was commenced. (*Osterman v. Baldwin*, 6 Wall. 116; *Jackson v. Beach*, 1 Johns. Cas. 401; *Craig v. Radford*, 3 Wheat. 591; *Fairfax v. Hunter's Lessee*, 7 Cranch, 607; *State v. Moore*, 28 Wis. 96; *Elmondorff v. Carmichael*, 3 Litt. 472; 14 Am. Dec. 87, and notes; *Gouverneur v. Robertson*, 11 Wheat. 332.)

"That an alien may take by deed or device, and hold against any one but the sovereign until office found, is a familiar principle of law, which requires no citation of authorities to establish." (*Cross v. De Valle*, 1 Wall. 8; *Osterman v. Baldwin*, 6 Wall. 116; *Fairfax v. Hunter*, 7 Cranch, 607; *Jones v. McMasters*, 20 How. 8; *Phillips v. Moore*, 100 U. S. 208; *Craig v. Radford*, 3 Wheat. 594; *Territory v. Lee*, 2 Mont. 124; 1 Washburn on Real Property, 50.)

The Supreme Court of Montana held, in the case of *Tibbitts v. Ah Tong*, 4 Mont. 536, that there is a distinction between receiving a title to the possessory right of the locator of mineral lands of the United States on the part of an alien, and the receiving of the title of another character of lands by such alien. In that case it is held that the right to purchase and take a conveyance of the possessory title of the locator of mineral lands of the United States, necessarily involves the right and capacity to

purchase from the government of the United States, and inasmuch as an alien cannot purchase from the United States, he cannot therefore be the holder by deed of conveyance of the possessory title of the locator of mineral lands; and that the effect of such purchase on the part of the alien, and conveyance to him of such possessory title, is the forfeiture of the title acquired by the locator of such mineral lands.

The opinion of the majority of the court is not sustained by any authority, and it is for this court to determine whether it will adhere to the majority opinion in that case or adopt the doctrine of the dissenting opinion of Mr. Justice Galbraith. If the opinion of the majority is to be maintained, then the refusal of the court below to nonsuit the plaintiff was clearly erroneous, because his title depends upon the deed of an alien. But if it is to be held that the common-law doctrine applies to possessory titles to the mineral lands of the United States, as held in the dissenting opinion, then the court should have found that the naturalization of appellant had a retroactive effect, and was a waiver on the part of the government of any right of forfeiture of his claim to the premises in controversy upon the ground of his alienage, and he should have been permitted to have maintained his status in court, and to have set up his rights under his cross-complaint if he could.

Kinsley & Knowles, and Wade, Toole & Wallace, for Respondent.

The objection to the citizenship of Fred Manuel was not made until judgment was rendered against the defendant. The motion for a nonsuit against the plaintiff was not made until after the nonsuit against the defendant had been granted, long after plaintiff had closed his case, and even after the defendant had closed and a nonsuit and judgment had been ordered against him. Hence the motion and objection was made too late. (*Higgins v. Mahoney*, 50 Cal. 444; *Leese v. Sherwood*, 21 Cal. 164.) If the objection had been urged in time and the record showed that Fred Manuel was an alien, nevertheless the proof of this point would not be within the issues in this case. Its effect would be to avoid the Columbia location and abandonment. (*Tibbitts v. Ah Tong*, 4 Mont. 542.) Where abandon-

ment or forfeiture is asserted to defeat a location once regularly made, the facts constituting such alleged abandonment must be pleaded before they can be proved. (*Switzer v. Renshaw*, 6 Mont. 464.) None of the authorities cited by appellant on this question have anything to do with unpatented mining claims, or in any way militate against the decision of the court in *Tibbitts v. Ah Tong*, *supra*. In any event the action of the court in nonsuiting the defendant, as to his location, would be error without injury, as the court expressly finds his grantor at the time of his alleged location to have been a trespasser. (*Belk v. Meagher*, 104 U. S. 279; *Taylor v. Middleton*, 67 Cal. 656.) Fred Manuel, as an honorably discharged soldier of the army in the late rebellion, was in the position of one who had declared his intention to become a citizen. (Rev. Stats. U. S. § 2166.) It is contended that the soldier is an alien until he takes his final papers; so, too, is one not a soldier, who has declared his intention to become a citizen. (*Malloy v. Duden*, 25 Fed. Rep. 673; *Orosco v. Gagliardo*, 22 Cal. 83; Morse on Citizenship, p. 69.) In making the declaration an alien does not take an oath of allegiance, but simply declares that it is *bona fide* his intention to become a citizen, while at the time of entering the army an enlisted soldier actually takes an oath of allegiance, and this oath is the important step in conferring the rights of citizenship. (Rev. Stats. U. S. §§ 1342, 1999; *Campbell v. Gordon*, 6 Cranch, 182; *Starke v. Chesapeake Ins. Co.* 7 Cranch, 420; *Murray v. Charming Betsy*, 2 Cranch, 64; *Alsberry v. Hawkins*, 9 Dana, 17; *Browne v. Dexter*, 66 Cal. 39; Morse on Citizenship, pp. 19, 42, 43, 120, 132.)

DE WITT, J.—This action is in the ordinary form of a contest between two claimants of a quartz lode mining claim upon the lands of the United States, to determine the right of defendant to proceed in the United States land office for patent thereto. On November 18, 1887, the defendant, Moses Manuel, made application in the land office for patent for the Marshal Ney Mining Claim. The plaintiff, Ivur Wulf, filed his adverse claim to such application, basing his contest upon his right to the premises by virtue of their location and possession as the Columbia Mining Claim, whereupon the parties were remanded

to the court of competent jurisdiction (§ 2326, Rev. Stats. U. S.) for the determination of their claims. The result was this action. The plaintiff's location of the Columbia Claim was made July 1, 1882, by Henry Pflaume, who was a citizen of the United States. November 30, 1885, Pflaume conveyed to Alfred Manuel. On November 30, 1887, Alfred Manuel conveyed to Ivur Wulf, the plaintiff. Such is plaintiff's location and deraignment of title of the Columbia lode. Defendant's title is as follows: His Marshal Ney Claim was located March 15, 1885, by said Alfred Manuel, "who," in the language of defendant's answer, "was then, and now is, a citizen of the United States." (See cross-complaint in answer, paragraph 2.) This allegation is undenied, and therefore, for the purposes of this action, will be taken as true. In October, 1885, Alfred Manuel conveyed to Moses Manuel, the defendant. It is conceded by counsel on the argument that Moses Manuel was an alien until the twenty-eighth day of May, 1889, when he was made a citizen, during the progress of the trial, being entitled thereto without a preliminary declaration for reasons unnecessary here to recite. The respective claims described are in conflict as to their area. No questions are presented as to due location, or annual representation, or compliance with mining laws, rules, or regulations, or sufficiency of the conveyances. The court below nonsuited the defendant upon his cross-complaint, for the reason that at the time when the Marshal Ney Claim was conveyed to defendant, and when he made his application to the United States for patent, and the action was commenced, he was an alien. The court further refused to nonsuit the plaintiff, the defendant moving for such nonsuit on the ground that Alfred Manuel was an alien when he received title from Pflaume, and transferred the same to plaintiff. Judgment was rendered for plaintiff for the possession of the premises. A motion for a new trial was made and denied. The defendant appeals from the order denying the new trial, and from the judgment as well. Appellant relies upon two errors, which we will consider in the inverse order of their presentation.

1. The court erred in refusing to nonsuit the plaintiff. The sole ground of the motion was that Alfred Manuel, who was a link in the chain of plaintiff's title, from November 30, 1885,

to November 30, 1887, was during that whole period an alien, and as such not competent to receive and transmit the title. The pleadings deny to this court the discussion of that proposition, although counsel in argument and brief have devoted much time thereto. The party making the motion, the defendant, has stated in his verified answer that said Fred Manuel was a citizen of the United States ever since March 15, 1885. This was admitted by the replication. Defendant could not afterwards be heard to deny and stultify his pleading by moving for a nonsuit, by which motion he was obliged to declare the falsity of his own answer. He was bound by the allegations of his answer, especially when the opposite party had accepted the truth thereof. The court as well had the right to accept such truth. Defendant's said motion for a nonsuit was properly denied. (*Mulford v. Estudillo*, 32 Cal. 139; *Herold v. Smith*, 34 Cal. 124.)

2. The only other error assigned is the action of the court in nonsuiting the defendant upon his cross-complaint. Moses Manuel, the defendant, obtained his title, if at all, by purchase in October, 1885. He applied to the United States for patent November 18, 1887. The action was commenced February 1, 1888. Defendant answered June 1, 1888. The cause was tried May 28, 1889. At all of these times the defendant was an alien, as admitted by counsel, and had not declared his intention to become a citizen of the United States. He became a citizen during the trial. This act of the defendant retroacted to all the previous events above recited. If this be the law, he should not have been nonsuited. He should have been heard upon his claim, that the right to the possession might have been declared to be in plaintiff or defendant, or neither. (21 U. S. Stats. at Large, ch. 140.) "That an alien may take by deed or devise, and hold against any one but the sovereign until office found, is a familiar principle of law, which it requires no citation of authorities to establish." (*Cross v. De Valle*, 1 Wall. 13.) Appellant then cites us to a line of decisions upon the question of the retroaction of the act of naturalization. These cases treat of land in its ordinary sense, and not of possessory rights to mining claims on the public domain. They all discuss grants between persons, and not the peculiar laws, rules, and regulations by which the sovereign power promises to sell its own

lands to certain described persons. These cases proceed upon the settled principle of law that an alien may take and hold land by grant until office found; and then they lay down the further rule that if the alien so holding become a citizen before office found, that the act of naturalization in the cases before the courts retroacts to the original acquirement of title. The cases referred to are *Osterman v. Baldwin*, 6 Wall. 122; *Jackson v. Beach*, 1 Johns. Cas. 401; *Craig v. Radford*, 3 Wheat. 594; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 607; *Gouverneur v. Robertson*, 11 Wheat. 332. But in the case at bar we encounter a class of real estate *sui generis*, viz., possessory rights to mining claims on the public domain of the United States, which rights are endowed with the qualities of real estate to a high degree. The land belongs to the United States. But the government says that it will sell this class of its lands to citizens of the United States, and to those who have declared their intention to become such, and to them only, and only to them when they have complied with certain laws of the United States and local mining rules and regulations as to the location and possession of such claims. No other persons may apply to purchase from the United States. The mineral lands of the government are not open to exploration, occupation, or purchase by aliens. An alien may not even take or hold real estate of this class any more than he may take or hold any real estate by descent. In descent, it is the rule of law, and not the act of the party that vests title in the heir. As to descent to an alien, the law says that it would be an idle thing to vest title in the alien by one act of law and then take it from him by another, viz., office found. (See *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 619.) So in conferring title to mining claims, and the possessory rights thereto. Such title and possessory rights are given only to the class of persons designated by the law, and by virtue of that law, and in the manner prescribed thereby. It would therefore be incongruous to hold that an alien could take and hold, until office found, these claims, by the provisions of the law which says that its benefits are extended only to citizens and those who have declared their intention to become such, and, after he had so taken and held them, resort to office found to deprive him of them. The parallel of the alien heir claiming

by descent, and the alien miner claiming under the mining laws, seems to be complete as to the principle on due consideration. To the alien is given no right to explore, purchase, or occupy mineral lands. This being his situation as an alien, without even the right to take or hold until office found, as he may other real estate, then, when he becomes a citizen, there is nothing, no previous taking or holding, or the right thereto, to which his subsequent naturalization can retroact. We are therefore of opinion that Moses Manuel, as an alien when the action was commenced, and when the title came to him, as he claims, could not be heard in court to assert his claim to the possessory right to the mining claim in controversy, and that his subsequent naturalization could not retroact as he urges. As to the proposition last discussed, see *Tibbitts v. Ah Tong*, 4 Mont. 536. Respondent has presented some objections to the record on the appeal. The views above expressed render a consideration of those objections unnecessary. The order of the District Court denying the new trial, and also the judgment, are affirmed.

HARWOOD, J., concurs.

BLAKE, C. J., was trial judge in the lower court, and did not sit in the case on appeal.

WULF, RESPONDENT, v. MANUEL, APPELLANT.

PLEADING—Mines and minerals—Forfeiture of mining claim.—In an action for the possession of a mining claim, a party relying upon a forfeiture by his adversary must specially plead such forfeiture; and the facts constituting the same must be alleged and proved upon the trial.

On rehearing. Same case reported *ante*, page 279.

De WITT, J.—A statement of this case appears fully in the opinion on the original hearing, and will not be repeated. We now learn that we fell into an error of fact, for which the rehearing was granted. In the record appear the names, Alfred Manuel and Fred Manuel. The similarity of the names, and the fact that Fred is an ordinary abbreviation for Alfred, led us

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18	519
23*	728
35*	114
9	248
24	251

to believe that these names represented one person, and that he was called indifferently Alfred and Fred. Our attention is now called to the fact that Alfred was the locator of the Marshal Ney Claim, and that Fred was the person who appears as a link in the chain of plaintiff's title. With this new light it becomes necessary to add a word to our former opinion.

Appellant contends that Fred Manuel was an alien during all the time that he purported to hold the title. He then takes the position, in his notice of motion for new trial, and in his specifications of error on the motion, and on the appeal, that when title was attempted to be conveyed by the deed from Pflaume to Fred Manuel a forfeiture took place, and the land escheated to the United States. We do not give any opinion, whether the said attempted conveyance worked a forfeiture or not; but we will assume for the sake of the argument that the appellant's view of that conveyance is entirely correct, and that it had the effect that he claimed, that is to say, that it worked a forfeiture, and will decide the case on the theory that appellant advances. A party relying upon a forfeiture by his adversary in these contests for the possessory rights to mining claims must specially plead such forfeiture, must set forth the facts constituting the same, and prove them on the trial. The answer in the case denies the plaintiff's ownership, possession, and right of possession of the premises. It does not specially plead the forfeiture now claimed; it does not set forth the facts constituting the same; it does not inform the plaintiff that a forfeiture is to be urged, or the nature of the acts or omissions working such forfeiture. If defendant intended to rely upon a forfeiture by plaintiff, he has not observed the rules of law governing that plea. He was properly not heard upon that plea in the court below, and cannot be so heard now. (*Dutch Flat Water Co. v. Mooney*, 12 Cal. 534; *Du Prat v. James*, 61 Cal. 361; *Morenhaut v. Wilson*, 52 Cal. 263; *Renshaw v. Switzer*, 6 Mont. 464; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53; *Hopkins v. Noyes*, 4 Mont. 556.) The order and judgment of the District Court are affirmed.

HARWOOD, J., concurs.

BLAKE, C. J., did not sit in the case, being disqualified.

9	288
9	476

9	288
25	512

9	288
c28	403
c28	404

9	288
c27	447

9	288
c28	544
d28	547

**ST. LOUIS MINING AND MILLING COMPANY, RE-
SPONDENT, v. THE MONTANA COMPANY (LIMITED),
APPELLANT.**

CONSTITUTIONAL LAW — Statutory construction — Mining claims — Examination of mining property — Certiorari. — Section 376, first division, Compiled Statutes, provides for the inspection, examination, and survey of lode mining claims, upon an order of the District Court made upon the petition of any party having any right to or interest in such mining claim, where such examination or survey is necessary to protect such right or interest, upon notice to the adverse party in possession of such claim. *Held*, that the authority bestowed by this statute does not empower the District Court to grant an order that may be made unjust or oppressive, nor does it deprive the adverse party of his property without due process of law, and is therefore not unconstitutional, though it does not require the interest of the petitioner to be defined, and permits such examination before the commencement of any action by the parties and without bond, as such proceeding is the proper mode of securing the best evidence of which the case in its nature is susceptible, and though it does not provide for an appeal from such order, as the proceedings may be reviewed by the writ of certiorari.

Appeal from First Judicial District, Lewis and Clarke County.

An order for the examination and survey of defendant's property was made by HUNT, J. Defendant appeals from the order, and also applied for a writ of *certiorari* to review an order of the District Court, finding defendant's manager guilty of contempt of court for refusing to obey the order appealed from.

Cullen & Sanders, for Appellant.

The obnoxious features of section 376 are apparent at a glance. The quality of the "right or interest in" the mining claim to be shown by the petitioner is not defined. If issue is joined upon the allegations in the petition that the petitioner has an interest, it raises a question of fact which ought to be determined by a jury, unless the parties expressly waive their constitutional right to a trial by jury. This is a deprivation of the right to trial by jury and the sacrifice of important interests. Without any ascertainment of the rights of the parties, save what may be made by the judge on *ex parte* affidavits, a mine owner may be damaged to an unlimited extent; his property may be practically confiscated, and yet there is no relief or redress for him. No bond is required to be given to cover damages resulting from this invasion of his rights, nor is there any appeal allowed

by the statute from the action of the judge or court in granting the prayer of the petition. The injury may be absolutely incalculable. It may amount practically to a confiscation of the property. No appeal is provided for by the section under consideration, and if any exists it is by virtue of the provisions of the first subdivision of section 421 of the Code of Civil Procedure, which allows an appeal "from a final judgment in an action or special proceeding." Even if it should be held that the order granting the relief prayed for by the petitioner was a final judgment within the meaning of this section, and that under it an appeal to this court might be taken, the relief is not adequate. There is no method of staying the execution of the order pending the appeal. Our Constitution provides (§ 3, art. viii.) that "the appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity." The Supreme Court of California, under a similar provision found in the constitution of that State, held that a special proceeding, being neither a case at law nor in equity, an appeal would not lie. (*Appeal of Houghton*, 42 Cal. 36.) The petitioner claims an extralateral right in the Marble Heart because there is a lead having its apex within the surface boundaries of his claim, which, in its downward course, passes out of the east side line of his claim and into the surface boundaries of the Marble Heart. In this controversy this defendant has no part, or lot, or interest of any kind or character whatever, and yet if this section of the statute is law—is constitutional—it may be deprived of the use and enjoyment of its great property in order that this petitioner may ascertain what his rights are in the Marble Heart. Can this be "due process of law" within the meaning of section 27 of article iii. of our Constitution, or of the Fourteenth Amendment to the Constitution of the United States? (*Dartmouth College v. Woodward*, 4 Wheat. 519; *Bank of Columbia v. Oakly*, 4 Wheat. 244; *Westervelt v. Gregg*, 12 N. Y. 209; 62 Am. Dec. 160; *Penoyer v. Neff*, 95 U. S. 97, 704-733; *Davidson v. New Orleans*, 96 U. S. 97-104; *Den v. Hoboken etc. Co.* 18 How. 276; *Chauvin v. Valiton*, 8 Mont. 458; *Bank of the State v. Cooper*, 2 Yerg. 599; 24 Am. Dec. 517-522; *Brown v. Hummel*, 6 Pa. St. 86; 47 Am. Dec. 434.) In determining the constitutionality of this statute the question is not

what abuses the particular case presents, but what abuses may or can result from the enforcement of the law in any case. (*Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 533; 4 Kent Com. [9th ed.] 621; Story on Constitution, 264, 661; *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 274; Cooley's Constitutional Limitations [5th ed.], 436; *Lenz v. Charlton*, 23 Wis. 478.) The word "property," as used in the constitution, is defined to be the right to have, use, enjoy, and dispose of a thing, and this right may be violated without a physical taking of the property, or any attempt to transfer its title from one to another. (7 Hare Am. Com. Law, 759; *Wynehamer v. People*, 13 N. Y. 433; *In re Jacobs*, 98 N. Y. 105; 50 Am. Rep. 636; *People v. Otis*, 90 N. Y. 48; *People v. Gillson*, 109 N. Y. 400; 4 Am. St. Rep. 465.) There are six and only six methods by which the State may legitimately exercise power over private property, and these may be briefly classified as follows: (1) It may regulate the making of contracts with reference to property. (2) It may take property from an individual to compel the fulfillment of a moral or legal obligation. (3) It may deprive him of his property by way of punishment for a violation of law. (4) It may regulate the use of his property under the police power. (5) It may deprive him of his property for the payment of taxes. (6) It may take it for a public use under the law of eminent domain. (Lewis on Eminent Domain, § 2; Cooley's Constitutional Limitations, 477.) To justify the making of an order for an inspection, examination, or survey, the petitioner must establish the fact that he has "a right to or an interest in" the lead, lode, or mining claim so to be examined or surveyed, or that he is the owner of another mining claim, and that it is necessary for the purpose of protecting, ascertaining, and enforcing his rights in such claim, that he should be permitted to inspect, examine, or survey another mining claim belonging to his neighbor. In either case there is a question of ownership—of right or title to real estate to be found by the court. At common law the question of title to real estate could only be tried by a jury, and when the Constitution (art. iii. § 23) declares that the right to trial by jury shall remain inviolate, it cannot mean less than that in those cases which were only triable by

jury at common law, the parties shall be entitled to a jury trial, unless the right is expressly waived in the manner pointed out in the constitution itself. The right seems to be an absolute one in many of the States, and entirely beyond the discretion of the court to grant or refuse. (*Faulk v. Faulk*, 23 Tex. 653; *Taylor v. Person*, 2 Hawks, 298; *Mounce v. Byars*, 11 Ga. 180; *Brown v. Burke*, 22 Ga. 574.)

McConnell & Clayberg, of counsel, for Respondent.

There is but one question relied upon by appellant, viz., the constitutionality of section 376, under which the proceeding was instituted. Upon the question that the law is unconstitutional because it may become oppressive, we find a better argument than we are able to make in Cooley's Constitutional Limitations (5th ed.), page 197, et seq., and cases cited. We adopt what is said by Judge Cooley as our argument without further reference. As to the act being partial, special, or class legislation, Judge Cooley sums up the doctrine with reference to this class of legislation as follows: "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and character the legislature must judge." (Cooley's Constitutional Limitations, 483, and cases cited.) No appeal is granted by the terms of the act. The right of appeal is purely a statutory right and not a constitutional right. Therefore the legislature has full power to give this right in such cases as it may see fit, and where it is not given it does not obtain. (Cooley's Constitutional Limitations [5th ed.], 474; *Grissler v. Fowler*, 55 N. Y. 675; *Hewlett v. Elmer*, 103 N. Y. 156; *Maxfield v. Freeman*, 39 Mich. 64.) Is the statute void because no security is required of the petitioner to pay damages in case it is afterwards ascertained that no right of investigation exists? It would be a very peculiar doctrine to hold that in all cases a bond or other security should be required before any proceedings might be instituted in any court. Laws of that kind are never passed, and the furthest the legislatures have ever gone is to provide that upon certain showings being made by the defendant, the plaintiff might be required to give security. (*Marsh*

v. *Steele*, 9 Neb. 96; 31 Am. Rep. 406.) It is claimed by the respondent that because the law does not give the party the right of trial by jury it is in violation of section 23, article iii. of the Constitution of the State of Montana, which provides that the right of trial by jury shall remain inviolate. This provision is similar to that in the constitutions of almost all other States, and has received judicial construction under a variety of circumstances, and it has been invariably held that it means, that in whatever cases the right of trial by jury was allowed prior to the adoption of the constitution, such right should continue in such cases. The courts have just as universally held that such provision does not apply to cases where no right of trial by jury was given prior to the adoption of the constitution, nor to proceedings established after the adoption thereof. (*Lee v. Tillotson*, 24 Wend. 336; 35 Am. Dec. 624; *Ross v. Irving*, 14 Ill. 171; *Ex parte Carpenter*, 64 Cal. 267; *Flint River Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Lake Erie etc. R. R. Co. v. Heath*, 9 Ind. 558; *Whallon v. Bancroft*, 4 Minn. 109; *Work v. State*, 2 Ohio St. 297; 59 Am. Dec. 671; *Gaston v. Babcock*, 6 Wis. 490; *Stilwell v. Kellogg*, 14 Wis. 461; *Frazee v. Bratton*, Mar. 19, 1887, 2 S. E. Rep. 125.) The following cases are upon proceedings involving rights of neither an equitable nor maritime jurisdiction, in which it was held that the parties were entitled to a jury trial: *Livingston v. Mayor etc. of New York*, 8 Wend. 85; 22 Am. Dec. 622; *Whallon v. Bancroft*, 4 Minn. 109; *People v. Mayor etc. of Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Atherton v. Sherwood*, 15 Minn. 221; *Gaston v. Babcock*, 6 Wis. 503; *Ross v. Irving*, *supra*; *Stilwell v. Kellogg*, *supra*; *Sheppard v. Steele*, 43 N. Y. 52; 3 Am. Rep. 660; *Shirley v. Lunenburg*, 11 Mass. 379; *Orandall v. James*, 6 R. I. 144; *Frazee v. Bratton*, *supra*. There is no trial of any title to real estate authorized under this proceeding. It simply allows a person to compel the opposite party to produce evidence wholly and solely within his charge, so that the rights of the parties may be settled in future litigation. It is not trying the title to anything, and the order of the court or judge allowing such investigation to be made is not *res adjudicata* as between the parties in any proceedings relative to the title to the property. Counsel is mistaken in his position that at com-

mon law the question of title could only be tried by jury. Titles were not always tried by jury at common law. (*Ellithorpe v. Buck*, 17 Ohio St. 75.) Is the law unconstitutional because it deprives a person of his property without due process of law? Perhaps no question under the constitution of the United States, or the constitutions of the several States, has received judicial construction more frequently than this, and no perfect definition has yet ever been successfully attempted, but each case is construed to stand upon its own particular facts. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, determines that it is impossible to define the words "due process of law," so that such definition would cover every exercise of the power thus forbidden to the State, and exclude those which are not. As somewhat illustrating the different classes of cases and the opinions of the courts, we cite the following: *Hurtado v. California*, 110 U. S. 516; *Walker v. Sauvinet*, 92 U. S. 90; *Kennard v. Louisiana*, 92 U. S. 480; *Railroad Tax Cases*, 13 Fed. Rep. 782, and note. The exercise of the right given by the statute does not amount to a taking of the property within the meaning of the constitution. In order that property be *taken* within the meaning of the constitution, there must be a permanent deprivation of the owner of his property, either by physical taking or by interference with the use and enjoyment. (*Winslow v. Gifford*, 6 Cush. 327; *State etc. Land Co. v. Seymour*, 35 N. J. L. 47.) The rights given by this statute are not new ones, but have been recognized by the common law for almost a century, and the statute itself is simply declaratory of the common law in this regard, giving a specific mode of procedure. (*Thomas Iron Co. v. Allentown M. Co.* 28 N. J. Eq. 77; *Lewis v. Marsh*, 8 Hare, 97; *Bennett v. Whitehouse*, 28 Beav. 119; *Bennett v. Griffiths*, 30 Law J. Q. B. 98; *Whaley v. Brancker*, 8 Morrison Min. Rep. 21; *Earl of Lonsdale v. Curwen*, 7 Morrison Min. Rep. 693; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.)

Brief of *E. W. Toole*, of counsel, for Respondent.

It is claimed by counsel that the law is one of unusual hardship, and might be used as an engine of oppression and injustice. The powers conferred by the act are only such as would

have been possessed by the court below in the exercise of its chancery jurisdiction without it. That this power may be abused is an argument, if argument at all, that is applicable in all cases. It is simply making the necessary use of the only accessible means employed in the perpetration of a fraud and commission of a trespass, in the possession and control of the wrong-doer, to ascertain the extent of the injury and damage he has done. It makes the person, who by secret means is committing a wrong, produce the evidence thereof which he alone possesses. The appellant, a foreign corporation with immense machinery and works, is engaged in gutting the mine of respondent at great depth under-ground. Possessing the only means of ascertaining the facts sufficient to authorize a recovery, it virtually says, by resisting the petition, it will not permit the use of those means. The statute, we claim, is based especially upon equitable principles. It makes the party having the only evidence in his possession to permit it to be produced, and requires the use of every means employed in the destruction of the property of his neighbor in the production of that evidence.

Bonds given in any case are not creative of the right, but a part of the remedy, as a precautionary step in legal or equitable proceedings. It can contribute nothing in determining the constitutionality of a law like this.

The fact that the statute fixes the minimum of time allowed for the notice does not enlarge the powers, or subject it to greater abuses than if no limitation was had, and the matter was left, as it otherwise would have been, to the discretion of the chancellor. (*Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, et seq.; Tiedman on Limitations of Police Powers, 207, § 89.) This is emphatically a bill filed for the purpose of obtaining an order for the production of testimony, and the order is in the nature of an interlocutory order, because in contemplation of litigation and essential to the trial of the rights involved. It involves the question of the power to require the production of the best evidence in furtherance of judicial proceedings. It is insisted that a suit should be pending at the time the order is made. It is difficult to see what difference it makes whether the order is granted in an independent proceeding in view of an action, or upon petition during the pendency of an action. If

the evidence is essential it must be had beforehand, or at least during the trial. In every instance it must precede the judgment and verdict. According to the views expressed by counsel, appellant is entitled to a jury trial, and the condemnation of, and payment of damages for the use of its work before such an order could be made. This is fallacious for two reasons: 1st. Condemnation could only be had for a public purpose; and 2d. It would require the same identical testimony in question to show the necessity for it if it could be condemned for private uses. It is tantamount to saying that the merits of the controversy to be settled between the parties should be first tried, and the order be made a part of the decree. In other words, you cannot get a judgment or decree without the evidence, and you are not entitled to the evidence until you get your judgment or decree, i. e., you have no rights at all. The converse of the position of counsel is entitled to far more consideration upon constitutional grounds than the position taken. The only question is, is it the best evidence, and is it absolutely necessary in maintaining justice? If so, withholding it is defeating the ends of justice. Should the legislative assembly have sought to take away a remedy absolutely essential to the enjoyment of the right, it would have been nothing short of confiscation. Conceding that in a common law action this could not be done for the reasons cited by counsel for appellant, equity then comes to the rescue in securing even and exact justice. It is a doctrine familiar to the practitioner in the Territories that the chancery power conferred upon the district judges under the organic act, is such as is exercised by the courts of chancery in England, and that the mode of its exercise may be defined by the legislative assembly as is here done, but that it cannot take away the jurisdiction. What then were the powers of the courts of equity under its system of jurisprudence in England? Upon this question see *Bennett v. Whitehouse*, 28 Beav. 119; S. C. 8 Morrison Min. Rep. 17; *Lewis v. Marsh*, 8 Hare, 97; *Walker v. Fletcher*, 3 Bligh, 172; *Bennett v. Griffiths*, 30 Law J. Q. B. 98; *Bennett v. Griffiths*, 8 Morrison Min. Rep. 21; *Whaley v. Braucker*, 10 L. T. N. S. 155. This right is to prevent a forfeiture and sacrifice of property, and is based upon the same principle of an order and injunction to permit the representation of a mine

when a representation is required. Such right and power either exists in the court by statute, or is otherwise exercised by reason of its equitable powers. (*Thornburg v. Savage M. Co.* 1 Pac. L. Mag. 267; *Thomas Iron Co. v. Allentown M. Co.* 28 N. J. Eq. 77; *Sacramento etc. M. Co. v. Showers*, 6 Nev. 291.) The Supreme Court of Nevada recognized the equitable powers before the passage of the statute of that State. California, Colorado, Nevada, Idaho, and Montana all have statutes similar in so far as the questions here involved are concerned, and their validity has not been questioned. (See, also, 1 Pomeroy's Equity Jurisprudence, 197, 198, 201, 205, 216, 230; 3 Greenleaf on Evidence [13th ed.], § 328; *Kynaston v. East India Co.* 3 Swanst. 249; Hunt on Boundaries and Fences, 67; *Comstock v. Apthorpe*, 8 Cowen, 386.)

BLAKE, C. J. — The St. Louis Mining and Milling Company of Montana filed its petition in the District Court of Lewis and Clarke County, and alleged that the petitioner is a corporation under the laws of Montana; that the Montana Company, Limited, is a corporation under the laws of Great Britain; that the petitioner is the owner of the St. Louis Quartz Lode Mining Claim, situated in said county; that the Montana Company, Limited, is the owner of the Marble Heart, the Maskelyne, and the Nine Hour Quartz Lode Mining claims; "that being desirous of, and it being necessary for your said petitioner . . . to have an inspection, examination, and survey made of the premises last aforesaid, in order to enable it to institute its action to recover the possession of the said property, so owned by it, and for the recovery of such damages as it may have sustained by reason of the taking, extraction, and conversion of the quartz rock, ore, and mineral, taken by the said Montana Company, Limited, from the mining claim and premises, so owned by your petitioner, and for the purposes of enabling it to have such inspection, examination, and survey made of its said premises, and of all veins or deposits of mineral-bearing quartz rock or earth in place, the apices of which are within the surface boundaries of the St. Louis Mining Claim, . . ." a notice was served upon the Montana Company, Limited, which is made a part of the petition; that the Montana Company, Limited, is in the

possession of "certain tunnels, shafts, stopes, winzes, drifts, and excavations within the planes of the exterior boundaries of the said Marble Heart, Maskelyne, and Nine Hour Lode Mining claims, extending vertically downward, and beneath the surface of the said claims, and upon veins or deposits of ore, the apices of which are within the exterior boundaries of the St. Louis Quartz Lode Mining Claim" and has been extracting large quantities of ore belonging to the petitioner; that the said tunnels, shafts, stopes, winzes, drifts, and excavations of the Montana Company, Limited, connect with the said St. Louis Mining Claim, and are the only means for entering into the same; "that the inspection, examination, and survey thereof was and is absolutely requisite and necessary in order to determine the rights of the respective parties, and to ascertain the extent of the trespass, damage, and injury occasioned by the said wrongful and unlawful acts of the said Montana Company, Limited, in so entering the premises of your petitioner, and extracting the quartz, rock, ore, and mineral from same, and in constructing their said tunnels, shafts, stopes, winzes, drifts, and excavations thereon; that for said purpose it was and is necessary that your petitioner, and such persons as may be designated by this court, shall have access to and in the shafts, works, and machinery, convenient or necessary to make the inspection, examination, and survey aforesaid," of which the Montana Company, Limited, is in the possession.

The prayer of the petitioner is as follows: "Wherefore, your petitioner prays that your honor appoint a time and place for hearing this petition, and that an order for service of notice thereof upon the said Montana Company, Limited, be made; that such proceedings be had and done under section 376, aforesaid, as will secure to your petitioner the rights to which it is entitled in pursuance thereof, and that upon such hearing an order be made for the inspection, examination, and survey, so refused to your petitioner, and that the persons appointed by your honor shall have free access to the premises aforesaid."

The notice which is mentioned contained recitals of facts similar to those of the petition, and was a demand for an inspection, examination, and survey of the under-ground works of the said lode mining claims of the Montana Company, Limited. The

petition was filed November 6, 1889, and the judge ordered that the hearing be had five days thereafter. The Montana Company, Limited, appeared and filed an answer, which denied the allegations of the petitioner.

The court below made an order "that an inspection, examination, and survey of the shafts, tunnels, levels, works, and stopes be made as prayed for," continuing twenty days, and designated eight persons to make the same; that "said party shall have the right to pass in and out the mouths of the tunnels of the defendant without hindrance;" that "said work shall be completed within said twenty days, unless for good cause the court shall order a longer time to be used;" the survey by the said petitioner to be confined within the vertical planes of the end lines of the St. Louis Mining and Milling Company's claim, except so far as it may be necessary to run lines in the tunnels, levels, stopes, drifts, or winzes outside of such planes, in order to complete an accurate survey of said workings within the said end lines; ". . . the petitioner's survey to be conducted, so far as possible, without interference with the regular and orderly working and operation of the mine, or the employees of defendant in the discharge of their various duties; and the engineer of the party of petitioner shall not dispose of or sell to any one any plan or section of said mine, or any matter or *data* obtained during or resulting from this survey, except to the petitioner, its agents and attorneys. Petitioner's surveyors are not to enter said mine unless accompanied by three representatives appointed by the defendant to accompany them, unless after reasonable notice, not to exceed one hour, such persons shall fail to attend. The persons so hereinbefore authorized to make such survey shall not take or remove from said mine any samples of ore or minerals at any point therein, but they shall be allowed to examine and trace the walls of the vein or fissure, and for this purpose they shall be allowed to use the pick, and remove such material as shall enable them to make such examination."

Afterwards, R. T. Bayliss, the general manager and superintendent of the Montana Company, Limited, and who was in the control of the property which is described in the foregoing order, refused to comply therewith, or permit said persons to make the survey. Upon proper proceedings had in the premises, Bayliss

was arrested, and pleaded guilty to the charge of contempt of the court, and was punished by a fine. The Montana Company, Limited, appeals to the court from the "final judgment and order . . . allowing an inspection, examination, and survey of the Marble Heart, Maskelyne, and Nine Hour Quartz Lode Mining claims, . . . duly made and entered in said action . . . in favor of the above-named petitioner, and against this defendant, and from the whole and every part thereof." Upon the application of the Montana Company, Limited, a writ of *certiorari* was issued out of the court to the District Court, commanding it to certify fully to this court, and annex to the writ a transcript of the record and proceedings referred to, that the same might be reviewed.

The argument upon this hearing has been restricted to one question. Counsel concede that all the proceedings in the court below have been regular in form, and derive their validity from the following section of the Code of Civil Procedure: "Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or, whenever any inspection, examination, or survey of such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim, and the person in possession of the same shall refuse, for a period of three days after demand therefor in writing, to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the District Court, or a judge thereof, of the county wherein the mine, lead, lode, or mining claim is situated, a petition, under oath, setting out his interest in the premises, describing the same; that the premises are in the possession of a party, naming him; the reason why such examination, inspection, or survey is necessary; the demand made on the person in possession, so to permit such examination, inspection, or survey; and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served upon the adverse party, which notice shall

be served at least one day before the day of hearing. On the hearing, either party may read affidavits; and if the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination, or survey of the lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action; but all costs of making such examination or survey shall be paid by the petitioner." (§ 376.)

It is contended that this statute is unconstitutional, and authorizes the inspection, examination, and survey of the mining property of the Montana Company, Limited, upon the petition of the St. Louis Mining and Milling Company of Montana, and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief, and may be summarized under the following heads: This law may be made an instrument of oppression and injustice. The quality of the interest of the petitioner is not defined. No bond is required to be given to secure the payment of the damages which may result to the owner of the property which is invaded. No appeal is allowed from the order of the court or judge in granting the prayer of the petitioner. The power of the court or judge is vast, and can practically confiscate any mine in the State. The innocent owners of mining property are injured without "due process of law," and arbitrarily deprived of the right of trial by a jury. The commanding position of the mineral interests of this State, and the importance and extent of this remedy which is applicable to them, demand the careful study of the principles which have been invoked by counsel.

Before we investigate the propositions which have been announced, it will be instructive to ascertain the origin of this provision of the Code, and thereby discover its purpose. The source is unquestionably found in the chancery practice of England, and we must review the cases which are generally controversies

affecting coal lands. In the *Earl of Lonsdale v. Curwen*, 3 Bligh O. S. 168, an order was made in the year 1799 that the plaintiff and his servants "should be at liberty to inspect the workings of the defendant under the plaintiff's enclosures." It is shown by affidavits that an inspection of the premises was then prevented "because the pipe or air course which conveyed the pure air had been broken down or taken away, and certain earth, rubbish, and other impediments were lying at the ends, roads, or passages leading to the workings." It was thereupon further ordered that "the defendant should cause the obstructions to be removed, and open the air courses as the viewers should think necessary for such inspection; and that the viewers, and such other persons as they should appoint, should be at liberty, as often as should be necessary, to make from time to time inspections into the workings of the defendant under the premises of the plaintiff, so as to enable the viewers to make a perfect and complete report of the workings." In *Walker v. Fletcher*, 3 Bligh O. S. 172, the same proceedings were had in the year 1804, and it was also ordered that the defendants should remove certain dams and obstructions in their works as the inspectors should direct, so that the plaintiff might view the pit of the defendants. In *Blakesley v. Whieldon*, 1 Hare, 176, the parties entered, in the year 1838, into a contract for the sale of minerals situated on certain tracts of land. Differences arose as to whether the plaintiff should have power to go down into any of the mines comprised in the contract, or whether the power, if granted, should not be confined to the right to descend any pits or shafts sunk on the land over the demised mines. In pursuance of the opinion of the vice-chancellor, a decree was entered, "empowering the plaintiff and his agents, at all reasonable times, and upon reasonable notice, to enter the mines in the pleadings mentioned, and to inspect and measure the same, so far as from time to time may be necessary." The vice-chancellor observed that the evidence proved "that the power of inspection was an unusual reservation in cases like the present." In *Lewis v. Marsh*, 8 Hare, 97, a bill was filed by the lessors of a colliery against the lessees, and heard in the high court of chancery in the year of 1849. It appears that "there was no provision for inspection in the lease, and the defendants had worked the coal through a shaft in

an adjoining mine belonging to themselves, so that the demised mine could only be entered through the defendants' mine." Counsel "moved that the defendants might be ordered to permit the plaintiffs, and certain persons mentioned in the notice of motion, all or any of them, with workmen and other necessary assistants, at all reasonable times, and from time to time, to have access to the coal works of the plaintiffs in and through the adjoining coal works of the defendants, to inspect and examine the said coal works, the property of the plaintiffs, and to ascertain the real extent, state, and condition thereof, and the real weight of the coal from time to time worked by the defendants therefrom." They submitted that they "were entitled to the means of proving the fact that the defendants had worked beyond their boundary." The defendants opposed the motion, upon the ground that "the plaintiffs might, if they had desired any such power of inspection, have reserved it in their lease; but they had made no such contract. . . . The plaintiffs sought not only to inspect the demised coal works, but also to pass for that purpose into and through the property of the defendants. No implied contract gave the plaintiffs such a right. Admitting that a power of inspecting their own mine might be impliedly reserved, it must be exercised in a lawful way, at their own expense. The plaintiffs might open a shaft, and descend into the mine, upon their own property; that must be the extent of their legal right under the contract." The vice-chancellor, in the opinion, says: "I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do. . . ." The order of the court is similar to that in *Blakesley v. Whieldon, supra*. The defendants objected to the admission into their mine of certain persons mentioned in the notice of the motion, and the plaintiffs consented to withdraw them; "and it is ordered that the defendants do permit the said plaintiffs, and the persons so to be appointed, . . . to have access to, and to view and inspect the said mine and workings; but this order is not to entitle the plaintiffs to

view or inspect any part of the defendants' mine except for the purpose of ascertaining the boundary of the plaintiffs' mine."

In *Bennett v. Whitehouse*, 28 Beav. 119, the master of the rolls says, in the opinion: "It is established by the cases that, if a person is making use of his property to the injury of the property of his neighbor, the latter is entitled to an inspection, in order to ascertain the extent of the injury; and this court only requires him to show a *prima facie* case. . . . If it were a question depending only on the balance of testimony, I should, in this case, be in favor of the defendant. But the court requires the best evidence of the fact, and the best evidence here is by an examination of the workings in the defendant's mine. Suppose a man had a right to the surface, and that another person was entitled to the minerals; if the latter insisted that the former had sunk a shaft, and was obstructing his minerals, would not this court allow an inspection, in order that the facts in dispute might be ascertained? I have acted upon that principle in *Adshead v. Needham*, in which I allowed the plaintiff to go through a gallery in the defendants' mine in order to inspect it. . . . Whenever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted, still, as the only way of ascertaining the fact is by an inspection, the court always allows it, if it can be done without injury to the defendant."

In *Bennett v. Griffiths*, 30 Law J. Q. B. 98, the judgment of the court was delivered by Cockburn, C. J., who said: "The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that as ancillary to that power, the courts of equity have ordered the removal, where necessary, of obstructions to the inspection. In the notes to the *East India Co. v. Kynaston*, 3 Bligh O. S. 153, 168, two cases are referred to in which, under circumstances very similar to the present, such orders were made." The learned judge then cites and approves the cases of *Earl of Lonsdale v. Ourwen*, *supra*, and *Walker v. Fletcher*, *supra*, and adds the following observation: "This latter case, which was decided in the time of Lord Eldon, is a strong assertion of the power to remove obstructions to inspection." (See, also, *Whaley v. Braucker*, 10 L. T. N. S. 155.)

The English authorities which have been collated will be considered further, and we will now notice the American cases to which our attention has been invited. The earliest that we have read is *Thornburg v. Savage Mining Co.* 1 Pac. L. Mag. 267, which was decided in the year 1867, in the Circuit Court of the United States for the district of Nevada. The main issue was whether the property claimed by the plaintiff was a separate and distinct quartz lode from the vast mineral vein, which is known as the "Comstock Lode," and a petition was filed praying for an inspection of the premises. After a full statement of the facts, which it is needless to repeat, Mr. Justice Baldwin delivered this opinion: "Ought a court of equity, in a mining case, when it has been convinced of the importance thereof, for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied; and the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft, and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts; and can it refuse to learn the facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed, viz., *Bainbridge on Mines.*" (See 2d ed. 511, 512.)

The next case in point of time is that of *Stockbridge v. Cone Iron Works*, 102 Mass. 80, which was heard in the year 1869.

Chief Justice Chapman, in the opinion, says: "The plaintiffs complain that the defendants dug a shaft on their own land, near the line of the plaintiffs' land, and thence excavated drifts, extending under-ground, into the plaintiffs' land, and took out the ore which they found there. They ask that these drifts may be viewed. The order directs not only that the drifts may be examined by pumping the water out of the shaft, and going into it, and that the drifts may be examined which lead towards the plaintiffs' land, and also those which are under it, but that they may be cleared, so far as may be necessary, in order to ascertain what iron ore or other mineral has been taken from the land of the plaintiffs, and under the surface thereof, and that the viewers may do all acts that may be reasonably necessary to be done to effect the purposes of the decree." The expenses of the explorations amounted to the sum of \$4,841.07, and were taxed against the defendants, with the costs. Upon this matter, the opinion says: "But courts of law have power to allow the reasonable expenses of surveys and views in proper cases, and the fee bill does not apply to the expense of such proceedings. Mines are so situated that special and peculiar proceedings are sometimes necessary in order to attain the reasonable ends of justice in regard to the under-ground passages by which access to them may be obtained by trespassers."

In the cases of *Thornburg v. Savage Min. Co. supra*, and *Stockbridge Iron Co. v. Cone Iron Works, supra*, no authorities relating to this discussion are cited in the opinions, and the briefs of the counsel are not reported. In the year 1877, the case of *Thomas Iron Co. v. Allentown Mining Co.* 28 N. J. Eq. 77, was determined. An order for the inspection of a certain mine was made upon the *ex parte* application of the complainants, and the defendants insisted that they should have had notice thereof, and an opportunity to be heard. The chancellor says: "In a case like the present, where the application is for the inspection of a worked-out and almost abandoned mine, to ascertain the extent of the workings merely, and it appears that leave has been refused, the granting of the order for inspection is, on the making out of a *prima facie* case entitling the complainant to it, almost a matter of course." After quoting from *Bennitt v. Whitehouse, supra*, and *Lewis v. Marsh, supra*, he concludes:

"If the granting of the order for inspection is a matter of course on a *prima facie* case, notwithstanding the sworn denial of the defendant, it would seem that it might, at the discretion of the court, be made without notice to the defendant. It is undoubtedly, however, the better practice to require notice, enjoining, in the mean time, so far as may be necessary to preserve the *status quo*."

It will seem that the order of the court below followed an unbroken line of precedents. The rule of equity which has been enforced by the courts of England and America is not of statutory growth. In this State the legislative department has endowed the chancery practice involved in this hearing with the form of law. We are not called upon to decide that the District Courts of the State may make the order complained of, in the absence of any requirement of the Code of Civil Procedure. We can vindicate with absolute certainty the existence of the right to make an order for the inspection and survey of a lode mining claim, where the appropriate steps have been taken by interested parties. The authorities treat the proceedings as the proper mode of securing "the best evidence of which the case in its nature is susceptible." There is not an assertion or suggestion by any jurist that rights of property are impaired or transgressed by the making of the orders for an inspection and survey. For this reason, a bond to indemnify the persons whose property may be inspected is not asked for or required. But in *Bennett v. Griffiths*, *supra*, when authority was given for the destruction of a wall, to enable the viewers to perform their duty, the defendants testified that "it would be injurious to their mines if a gate road was driven through the wall; that the wall which had been erected was only the usual and proper wall, erected for the purpose of strengthening the gate road in that portion of the mine." Under these circumstances, the plaintiff was ordered to give security to save the defendants from any loss or damage resulting from the inspection.

We have stated that the power of the courts of England over this matter was exercised as a branch of their chancery jurisdiction. In 1854 the Common-law Procedure Act was enacted, and the fifty-eighth section provides that "either party shall be at liberty to apply to the court or a judge for a rule or order for

the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order. . . .” In the interpretation of this statute, the learned Chief Justice Cockburn, in *Bennett v. Griffiths*, *supra*, said: “The fifty-eighth section of the Common-law Procedure Act does not regulate the jurisdiction given to the courts of law by reference to that already exercised by the courts of equity; but we think that, as ancillary to the power of inspection given to the courts of common law, there is the same power given to remove obstructions, with a view to inspection, which was exercised by the courts of equity as ancillary to their power of ordering inspection.”

The section of the Code under review does not empower any court or judge to grant an order that is fruitful of injustice or oppression. Whenever this is done, such action will exceed the authority that has been bestowed, and can be rightfully set aside. The bare fact that the St. Louis Mining and Milling Company of Montana petitions for an inspection and survey of the mining property referred to before its complaint has been filed is immaterial. The same object is to be attained at all times, regardless of the commencement of the suit, and that is the best evidence for the trial. In *State v. Seymour*, 35 N. J. L. 53, the court holds that the surveying and mapping of lands by legislative authority is not a taking thereof, and that it is not a trespass to go thereon for these purposes. In *Winslow v. Gifford*, 6 Cush. 327, it is held that an act of the legislature is not unconstitutional which authorized certain parties to enter upon private lands, and make surveys and establish boundaries; and Mr. Justice Dewey, in the opinion, says: “In effecting such an object, there may be, and often is, a brief, and, as it were, momentary interference with the absolute right of the owner of real estate. This exercise of power, in its various forms, is one of every day’s occurrence; indeed, so common as to be acquiesced in without remonstrance, or even a question as to the right so to do.”

The statute does not provide for an appeal from the order, which has been reviewed, and the writ of *certiorari* has been

properly issued upon the application of the Montana Company, Limited.

We are of the opinion that the District Court has not exceeded its jurisdiction in determining and granting the petition of the St. Louis Mining and Milling Company of Montana. It is therefore adjudged that the order and proceedings of the District Court be affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

HERRON, RESPONDENT, v. FROST, APPELLANT.

MARRIED WOMEN—Statutory construction—Husband and wife—Promissory note.

—The common-law disability of husband and wife to enter into contracts with each other is not removed by the provisions of sections 1434 and 1435 of the fifth division of the Compiled Statutes, defining and prescribing the rights and liabilities of a married woman who has filed a declaration of sole trader, and a promissory note made by such married woman to her husband is a nullity and void in the hands of a *bona fide* purchaser. (Case of *Vantilburg v. Black*, 3 Mont. 459, cited.)

Appeal from Sixth Judicial District, Gallatin County.

The cause was tried before LIDDELL, J., without a jury.

Luce & Luce, for Appellant.

The common law is in full force in this State, except where expressly repealed or altered by the legislature. (§ 201, p. 647, Comp. Stats. Mont.; *Wilson v. Davis*, 1 Mont. 193.) There can be no doubt that at common law the civil existence of the wife is merged in that of her husband. Blackstone says that "husband and wife are one person in law," and that "the legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of her husband." (Vol. 1. p. 442; *Van Maren v. Johnson*, 15 Cal. 312.) A married woman has no power to execute a promissory note in her own name. (*Simpers v. Sloan*, 5 Cal. 458.) No action will lie to recover upon a note given by a husband to a wife, or a wife to her husband, during coverture, for they cannot contract, and the note is void. (*Jackson v. Parks*, 10 Cush. 550; *Roby v.*

Phelon, 118 Mass. 541; *Stewart on Husband and Wife*, § 41, notes 8, 9, 10, §§ 36, 46, 356, 358; 1 *Parsons on Contracts*, 344, 365, 367, 359, n. *h*; *Sweat v. Hall*, 8 Vt. 187; *Yale v. Dederer*, 18 N. Y. 276; 72 Am. Dec. 503; *Newmark on Sales*, § 55; *Wallingsford v. Allen*, 10 Peters, 583, 594; *Knowles v. Hull*, 99 Mass. 562; *Wilson v. Bryant*, 134 Mass. 300; *Fowle v. Torrey*, 135 Mass. 89; *Silverman v. Silverman*, 140 Mass. 562; *Washburn v. Hale*, 10 Pick. 432; *Hyde v. Stone*, 9 Cowen, 230; 18 Am. Dec. 501; *Winslow v. Crocker*, 17 Me. 29; *Putnam v. Bicknell*, 18 Wis. 333; *Ballin v. Dillayne*, 37 N. Y. 35; *Winans v. Peebles*, 32 N. Y. 423; *Whitaker v. Whitaker*, 52 N. Y. 368; 11 Am. Rep. 711; *Bassett v. Bassett*, 112 Mass. 99; *Ingham v. White*, 4 Allen, 412; *Gay v. Kingsley*, 11 Allen, 345.) The note in this case was given before the passage of our Married Women's Act, approved March 3, 1887, but plaintiff claims that the note is valid under the provisions of article xi., fifth division, Revised Statutes of 1879, and particularly section 869 of said article. It is contended by the plaintiff that this section of the statute repeals the common law and destroys the unity of husband and wife, and allows them to contract. But it is clear that this doctrine is not sustained by any authorities. This statute, being in derogation of the common law, must be strictly construed. Nothing will be supplied by implication, and it will not be presumed to alter the common law further than it expressly declares. (*Sedgwick on Statutory Construction*, p. 267, and notes; *Stewart on Husband and Wife*, § 16, and cases cited; *Lord v. Parker*, 3 Allen, 127; *Snyder v. Webb*, 3 Cal. 83; *Wedel v. Herman*, 59 Cal. 511; *Selover v. American R. C. Co.* 7 Cal. 270; *Dow v. Gould & C. M. Co.* 31 Cal. 629; *Robertson v. Bruner*, 24 Miss. 242; *Kneil v. Egleston*, 140 Mass. 202; *Rosa v. Prather*, 103 Ind. 191; *Barnett v. Harsbarger*, 105 Ind. 414.) We think the case of *Barnett v. Harsbarger*, *supra*, and *White v. Wager*, 25 N. Y. 328, 333, 334, should settle the case at bar, both holding under statutes much more liberal than our own. The case of *Meeker v. Wright*, 76 N. Y. 262, was very much relied on by the plaintiff in the court below as changing the rule laid down in *White v. Wager*, but an examination of these two cases will show that such is not the intention or effect of the decision in *Meeker v. Wright*. In the

first place, *Meeker v. Wright* is purely an equitable proceeding; and in the next place it construed a later statute than that under consideration in *White v. Wager*; and in the third place it quotes with approval the case of *White v. Wager*. Statutes relating to the property rights of husband and wife do not affect their personal status or relation, and consequently, unless the statute refers to the husband specially, his disability is not removed. (Stewart on Husband and Wife, § 14, and particularly § 15, and cases cited.)

Armstrong & Hartman, for Respondent.

It is needless to discuss the rights of a married woman to contract with her husband under the common law. She had no such rights, and that question is not in this case. At the time of the execution of the notes sued on the only statute authorizing the wife to contract was the sole trader act (§§ 1433–1438, inclusive, 5th div. Comp. Stats. Mont.), and a construction of that statute will determine this case. The words of the statute are very broad, granting to a sole trader “all the privileges” and making her liable for “all the processes . . . provided by law against debtors and creditors.” It will be observed that there are no exceptions or reservations to the rights granted or obligations imposed by this statute, and there being no exceptions, reservations, or prohibitions, every right and corresponding obligation is hers, and she may contract with her husband. (*Bank of America v. Virginia Bank*, 101 U. S. 240; *Voorhees v. Bonesteel*, 16 Wall. 31; *Jaycox v. Caldwell*, 51 N. Y. 395; *Meeker v. Wright*, 76 N. Y. 264; *Wells v. Caywood*, 3 Colo. 492; *Hamilton v. Hamilton*, 89 Ill. 349; *Greer v. Greer*, 24 Kan. 101; *Morrison v. Thistle*, 67 Mo. 596; *Turner v. Shaw*, 96 Mo. 22; Schouler on Husband and Wife, § 396; 1 Randolph on Com. Paper, § 315; Schouler on Domestic Relations, 192; Bishop on Married Women, §§ 35, 37, 713, 717; *Zimmerman v. Erhard*, 58 How. Pr. 11, 13; *Albin v. Lord*, 39 N. H. 196; *Griswold v. Boley*, 1 Mont. 559; 3 Pomeroy’s Equity Jurisprudence, § 1126.) The defendant would be liable even if the note had not been executed for the benefit of her separate property. (*Wood v. Orford*, 52 Cal. 412; *Major v. Holmes*,

124 Mass. 108; *Deering v. Boyle*, 8 Kan. 525; 12 Am. Rep. 480; *Wicks v. Mitchell*, 9 Kan. 85.) Having signed the note as a sole trader, she is estopped from denying that it was given for any other than her use as such sole trader. (*Bodine v. Killeen*, 53 N. Y. 93; *Smith v. Dunning*, 61 N. Y. 251; *Nash v. Mitchell*, 71 N. Y. 203; 27 Am. Rep. 38; *Cashman v. Henry*, 75 N. Y. 112; 31 Am. Rep. 437; *Meeker v. Wright*, 76 N. Y. 262; *Saratoga Bank v. Pruyer*, 90 N. Y. 250.) The tendency of modern legislation is to abate the rigor of the common law regarding the disabilities of married women. But when a new right is extended to them a corresponding obligation is necessarily created. (*Meeker v. Wright*, *supra*; *Wells v. Caywood*, *supra*; *Hamilton v. Hamilton*, *supra*.) The Massachusetts cases cited by appellant are based upon a statute. (Gen. Stats. Mass. ch. 184.) The closing words of section 1 of that statute are: "Nothing in this act shall authorize a married woman to convey property or make contracts with her husband."

BLAKE, C. J.—The respondent filed, December 1, 1888, his complaint, and alleged that appellant is the wife of Nathan Frost; that she is a sole trader, carrying on the business of farming at Gallatin County, Montana; and that on the eighth day of February, 1887, as such sole trader, and for her use, benefit, and purpose, as such sole trader, she did make and deliver to said Nathan Frost, for a valuable consideration, the following promissory note, to wit:—

"BOZEMAN, MONTANA, February 8, 1887.

"Ten months after date, for value received, I promise to pay to Nathan Frost, or order, two hundred and sixty dollars, with interest at the rate of ten per cent per annum from date until paid.

LORETTA E. FROST, Sole Trader."

That afterwards, and before the maturity of this note, the respondent purchased it for a valuable consideration, and is now the owner and holder thereof, and that no part of the same has been paid.

The answer alleged that "said note was given by the defendant to said Nathan Frost for the balance of an account claimed by said Nathan Frost to be due to him from the defendant for

work done by said Nathan Frost for defendant long prior to the date of said note, and prior to the time the defendant filed her declaration as sole trader, and before she made such declaration, and before she commenced business as a sole trader, the greater portion of which work was done after the defendant was married to said Nathan Frost, and while they were living together as husband and wife, as aforesaid; and so the defendant says that said note was given to said Nathan Frost for what said Nathan Frost claimed of her as a balance due him on an account which accrued long prior to her declaration or commencement of business as a sole trader, and that the claim on account of which said note was given was not against her as sole trader, nor was it in any way connected with her business as a sole trader, nor for her benefit as a sole trader, nor for the purposes of her said business." The answer further alleged "that said note was transferred to the plaintiff by said Nathan Frost without her consent or knowledge;" that the plaintiff knew at that time that defendant was, and had been for a long time, the wife of said Nathan Frost; and that plaintiff knew all the foregoing facts when he purchased the note.

The replication avers that the defendant became indebted to Nathan Frost on an account for work done by Nathan Frost for her in the sum specified in the note; that this was the consideration of the note; and that before and after the purchase of the note she informed the plaintiff that she executed the note "for her use, benefit, and purposes, as a sole trader."

Subsequently the defendant moved the court for a judgment on the pleadings. The motion was overruled. The cause was tried by the court without a jury. The sole evidence offered was the note sued on. The motion of the defendant for a nonsuit was overruled, and judgment was entered for the plaintiff.

Assuming, for the purposes of the argument, that the note above recited is valid, its introduction as evidence establishes a *prima facie* case for the plaintiff. In California, under a similar statute, the court held, in *Melcher v. Kuhland*, 22 Cal. 524, that "the fact that she is a sole trader, and that she executed the note, is sufficient to raise the presumption, if any presumption is necessary, that the debt was contracted on account of her business as a sole trader." The appellant in the case at bar

strengthened this presumption, if possible, by adding to her signature the words "sole trader."

The question that now confronts us is this: Could a married woman, who was a sole trader under the laws of Montana upon the eighth day of February, 1887, make and deliver to her husband a legal promissory note? If she then possessed this power, the judgment was lawfully entered; but, if this authority has not been conferred in express terms, the instrument is void, and no recovery can be had thereon. The transfer of the note by the husband before it was due to a *bona fide* purchaser for a valuable consideration does not affect the relations of the parties.

There is a question of turpitude in this transaction, which is not within our jurisdiction; but we cannot keep silent, and will remark that the appellant has sought and accepted all the statutory privileges of a sole trader, and at the same time pleaded her disability as a married woman to evade the payment of an honest debt. We are obliged to confess that her defense is maintained by the authorities.

This court, in the case of *Vantilburg v. Black*, 3 Mont. 459, investigated some of the propositions which have received the consideration of counsel, and concluded that a married woman had no right to make a promissory note, and execute a mortgage to secure its payment, and that the entry of a personal and deficiency judgment against her was erroneous. Mrs. Vantilburg was not a sole trader, and the effect of the statute governing this subject was not involved in the decision. Does the act modify the common-law disabilities relating to husband and wife, and allow the appellant to make and deliver the promissory note which is owned by the respondent? The provisions of the statute, which are relied on by the respondent, declare that from the date of her declaration she "shall be individually responsible in her own name for all the debts contracted by her by virtue of said business." (Comp. Stats. div. 5, § 1434.) "After such declaration has been duly recorded, as heretofore provided, the person so making her declaration, as aforesaid, shall be entitled to carry on her business in her own name, and the property, revenue, money, and debts and credits shall belong exclusively to said married woman, and shall not be liable for any of the debts of her husband; and she shall be allowed all

the privileges, and be liable for all the legal processes, now or hereafter provided by law against debtors and creditors." (Comp. Stats. div. 5, § 1435.)

There is no clause which provides that a married woman, under this act, shall be liable for her engagements in the same manner as if she were sole, or that a husband or wife may enter into any contracts with the other respecting property which either might do, if unmarried, or any language of like signification. These weighty phrases, which are incorporated in the legislation of other States upon this matter, render inapplicable to this hearing the decisions of courts on which they are founded.

In *Lord v. Parker*, 3 Allen, 129, Mr. Justice Hoar refers to this legislation, and says: "Their leading object is to enable married women to acquire, possess, and manage property, without the intervention of a trustee, free from the interference or control, and without liability for the debts, of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband. . . . If she could contract with her husband, it would seem to follow that she could sue him, and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the rights of parties to testify, and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive; and the consequences which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings *in invitum* under the insolvent laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an alteration in the law involving such momentous results, and a change so radical, could have been contemplated by the legislature, without a much more direct and clear manifestation of its will."

In *Haas v. Shaw*, 91 Ind. 389; 46 Am. Rep. 607, the court construed a similar statute, and approved *Lord v. Parker, supra*, and said: "We are of opinion that these statutory provisions did not wholly abrogate or supersede the common-law rule in

force in this State at the time of their enactment, under which, as we have seen, a married woman was incapable of binding herself by any executory contract, and all such contracts, howsoever made, were absolutely void.”

In *Barnett v. Harshbarger*, 105 Ind. 414, the same views are entertained, and the court says: “The question is not whether disabilities have been removed, but whether the long prevailing rule of the law, declaring husband and wife to be one person in legal contemplation, has been annulled. This question cannot be solved by affirming that a disability has been removed, for there yet remains the positive rule that the husband and wife are one person. Until this rule is annulled, they cannot contract with each other as persons not bound together by marital ties, and, so long as they cannot thus contract, the usual rules of law do not govern their transactions.” (See, also, *Bear’s Adm’r v. Bear*, 33 Pa. St. 525; *Robertson v. Bruner*, 24 Miss. 244; *Jenne v. Marble*, 37 Mich. 325; *Dodge v. Kinzy*, 101 Ind. 106; *Roby v. Phelon*, 118 Mass. 541; Schouler on Domestic Relations [3d ed.], § 192; Kelly’s Contracts of Married Women, 225, 263, 264.) When these decisions are applied to the laws of Montana which were in force at the time of the making of the foregoing promissory note, we cannot escape the deduction that the appellant could not enter into contracts of this nature with her husband. The instrument which is the foundation of this action is a nullity, and cannot support the judgment which has been entered herein.

It is therefore adjudged that the judgment be reversed, with costs, and that the cause be remanded, with directions to dismiss the action.

HARWOOD, J., and DE WITT, J., concur.

LEBCHER, RESPONDENT, v. BOARD OF COMMISSIONERS OF CUSTER COUNTY, APPELLANT.

MUNICIPAL CORPORATION — Counties — Contracts of public officers. — Contracts made by public officers, as commissioners of a county, obtain validity only by force of the law authorizing their making, and persons contracting with such officers are charged with knowledge of their lawful power and the extent of their authority.

9	315
11	498
9	315
14	361
23*	718
36*	454
9	315
17	567
9	315
18	239
9	315
28	368
9	315
134	87
9	315
138	268

STATUTORY CONSTRUCTION — Contracts — County poor, sick, and infirm. — Sections 956, 958, 959, 960, and 962, fifth division of the Revised Statutes, provide in substance, that every poor person unable to earn a livelihood in consequence of bodily infirmities, idiocy, lunacy, or other cause, shall receive relief from the county, where there are no relatives financially able to maintain such pauper; that the county commissioners shall annually invite proposals and let contracts for the care, support, and maintenance of the sick, poor, and infirm, and that such persons shall cease to be a charge upon the county when reported by the county physician to be physically able to support and maintain themselves. A contract was let by the appellant for the care of the "poor" at a certain price *per capita*, and for the care of the "sick and infirm" at another price *per capita*. *Held*, that the contract was void, the only contract authorized by the law being one for the care of such persons as were poor and therewith sick and infirm.

JUDGMENT — Counter-claim — New trial. — In the case at bar, although the contract was void, judgment cannot be ordered for the defendant where it is impossible for this court to determine whether the jury cut down the demand of the plaintiff, or allowed a portion of defendant's counter-claim, and the case must be remanded for a new trial.

Appeal from Third Judicial District, Yellowstone County.

The cause was tried before LIDDELL, J.

J. H. Garlock, and Strevell & Porter, for Appellant.

The proposal of Clark was to care for the "sick and infirm" at \$12 per week *per capita*, and for the poor at \$1.50 per week *per capita* if cared for at the county poor-house, and for the poor at \$7 per week *per capita* if cared for in Miles City. This proposal was accepted. Before any person can become a legal charge upon the tax-payers of any county, he must be a *poor person, unable to earn a livelihood by reason of some of the causes named in section 956*. It is not enough that a person is *sick and infirm*. Nor does the fact of one's being poor of itself entitle him to be supported by the labor of others; he must be a poor person unable by reason of bodily infirmity to earn a livelihood. He must be poor, sick, *and* infirm. This is the plain provision of our law. This view of the law is confirmed by section 962, which provides that the county physician must once every week examine every person who is a county charge, and if any person is physically able to support and maintain himself, such person shall cease to be a charge upon the county. There was no authority of law then for letting such a contract as the alleged contract under which this claim is made. In the case of *Johnson v. Santa Clara County*, 28 Cal. 547, the court says: "A

contract providing for the care and treatment of sick persons not indigent, and if indigent not a resident of the county, would be void for want of power in the board to make it." It has been urged that neither this plaintiff, nor Clark, nor any one dealing with the county in this matter, was bound to know, or pay any attention to see whether or not the law was being complied with by the board of commissioners. This assumption is such a complete violation of every known principle of law that we have little disposition to cite authorities to show its absurdity. Mr. Dillon, in his work on Municipal Corporations (3d ed.), section 447, says: "It is a general and fundamental principle of law that all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation, or its officers, to make the contract; any contract beyond the scope of the corporate power is void. (*Parr v. Village of Greenbush*, 72 N. Y. 472; 1 Dillon on Municipal Corporations, § 457; *Zottman v. San Francisco*, 20 Cal. 105; 81 Am. Dec. 96.)

C. R. Middleton, for Respondent.

As to the liability of counties for beneficial use of money, labor, or property, though not formally obligated therefor, see 4 Am. & Eng. Encycl. of Law, 363, and the authorities there cited; *County v. Bridenhart*, 16 Pa. St. 458; *Salt Lake City v. Hollister*, 118 U. S. 259; *Louisiana v. Wood*, 102 U. S. 294; *Henderson v. Sibley County*, 28 Minn. 515; *Pimental v. City of San Francisco*, 21 Cal. 351; *Gray v. Tompkins County*, 93 N. Y. 603; *Stamp v. Cass County*, 47 Mich. 330; *Waitz v. Ormsby County*, 1 Nev. 370.) Where one performs services for which the county commissioners were authorized to contract, and with their knowledge and consent, and whose work was accepted and used by the county, and for the benefit of the county, he may recover what the work and materials were reasonable worth; and where a contract was in fact entered into, but was informal, it may be resorted to for the purpose of ascertaining the reasonable value of such work. (*Madison County v. Gibbs*, 9 Lea, 383; *Atkins v. Barnstable Co.* 97 Mass. 428; *Wolcott v. Lawrence Co.* 26 Mo. 272; *Moore v. Mayor*, 73 N. Y. 238; 29 Am. Rep. 134; 2 Kent Com. *291; *Smith v. County Commissioners*,

21 Kan. 669.) Where a contractor has entered into a contract in good faith, relying upon the regularity of the proceedings of the common council, the city having received the benefit of the performance, is estopped from questioning the regularity in that regard. (Dillon on Municipal Corporations [3d ed.], §§ 459 and notes, 938; *Moore v. Mayor, supra*; *Mott v. Hicks*, 1 Cowen, 513; 13 Am. Rep. 550.) If a party contracting with the commissioners of a county finds the acts to be within the scope of their authority, he has a right to assume that all the necessary conditions have been complied with; and when a party has rendered service to a county under such circumstances, the law will presume that all matters of formality have been complied with on the part of such board. (*Moore v. Mayor, supra*; Green's Price's Ultra Vires, ch. 5, p. 426.)

DE WITT, J.—In December, 1882, the board of commissioners of Custer County purported to let to one John Clark a contract for the care of the sick and infirm of the county for the following year at the rate of \$12 per week; and for the care of the poor of the county at the rate of \$1.50 per week if cared for at the poor-house, and \$7 per week if cared for in Miles City. The complaint alleges that in pursuance to the contract, John Clark cared for such sick and infirm, by reason whereof the county became indebted to him in the sum of \$6,098.87, including also his care for the poor to the extent of \$13.50 at the poor-house, and \$365 at Miles City; that this indebtedness was assigned by John Clark to the plaintiff. This constitutes plaintiff's first cause of action, on which he recovered judgment for nearly the whole amount, it appearing that for some reason the verdict was for \$800 less than the demand. The county appeals from an order denying a new trial, and from the judgment.

The action was upon the alleged contract, the validity whereof was attacked by defendant, and to the admission of which in evidence numerous exceptions were taken and saved. The judgment was obtained on the contract. We will therefore first examine the validity of the contract. If made at all, it was made under authority of the statutes which were at that time found in the Revised Statutes, fifth division. "Sec. 956. Every poor person who shall be unable to earn a livelihood in conse-

quence of bodily infirmities, idiocy, lunacy, or other cause, shall be supported by the father, grandfather, etc.; *provided*, that when any person becomes a pauper from intemperance or other bad conduct, he shall not be entitled to any support, except parent or child." "Sec. 958. When any poor person or persons shall not have relations, . . . then the said pauper shall receive such relief as the case may require, out of the county treasury, as is hereinafter provided. Sec. 959. The county commissioners of their respective counties shall, at their regular session in September of each year, make an order directing the clerk of the board to publish a notice in a newspaper inviting sealed proposals for the care, support, and maintenance of the sick, poor, and infirm of the county, *per capita*, by the week, for the succeeding year," etc. "Sec. 960. Said proposals shall be addressed to the clerk of the board of county commissioners, and the said commissioners shall, at their December term, . . . open and carefully compare said bids or proposals, and shall award the contract for the care, support, and maintenance of the sick, poor, and infirm of the county, by the week, *per capita*, to the lowest responsible bidder for the ensuing year." Section 962 provides that the county physician shall "examine each week all persons who are or may become a charge upon the county; and if, after such examination, he shall be satisfied that the physical condition of such person or persons is such as to enable such person to support and maintain himself or herself, he shall so notify the contractor or contractors having such person or persons in charge." The statute provides for the form of the notice, and filing a duplicate, and then says: "And after the serving of said notice, and filing the duplicate thereof with the clerk, said person mentioned in said notice shall cease to be a charge upon said county."

It appears in evidence, from the records of the board of county commissioners for the December meeting, 1882, that bids were filed by divers persons for the care of the sick, poor, and infirm; that John Clark filed separate bids as follows: "John Clark proposed to care for the sick and infirm for the consideration of \$12 per week *per capita*, and for the poor for the consideration of \$1.50 per week *per capita* at the county poor-house, and for the poor for the consideration of \$7 per week *per capita* in

Miles City." These bids were accepted. As far as it is necessary for us to here consider the matter, these bids and the acceptance constituted the contract upon which plaintiff sues. For the services alleged to be rendered under this contract, the claim for which services was assigned to plaintiff, plaintiff obtained his judgment on his first cause of action.

The defendant, in its answer, alleges fraud, collusion, and connivance between Clark, plaintiff, and the members of the board of commissioners. No evidence of this, however, was introduced except as it may appear on the face of the contract. Defendant also sets up a counter-claim in a large amount, in regard to which there was testimony.

We will first determine whether the contract which, as we have said, was the foundation of plaintiff's first cause of action, was valid.

The contract was made with public officers, with the commissioners of Custer County. An individual may contract as to lawful subjects as he pleases. Municipal corporations or public officers are bound by the law. They are authorized by the law of their creation to make certain contracts. They are creatures of the law, and not of nature. They have not natural rights, but only rights given by the law. Their contracts obtain validity only by force of the law authorizing their making. It follows that, if they make contracts that the law does not empower them to enter into, there is no authority for such contract, nothing for it to stand upon, and it falls of its own weight. It is void. (*Parr v. Village of Greenbush*, 72 N. Y. 463; *Head v. Providence Ins. Co.* 2 Cranch, 127; *Bonesteel v. Mayor*, 22 N. Y. 162; *Foster v. Coleman*, 10 Cal. 279; *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96; *Argenti v. San Francisco*, 16 Cal. 256; *City of Alton v. County of Madison*, 21 Ill. 115; *Dillon on Municipal Corporations*, § 381; *Thomas v. Richmond*, 12 Wall. 349; *Clark v. Des Moines*, 19 Iowa, 209; *Loker v. Brookline*, 13 Pick. 348; *Philadelphia v. Flanigen*, 47 Pa. St. 27.)

Persons contracting with such artificial creations of the law, as municipal corporations and public officers, are charged with notice of the character and constitution of the entity with which they deal. They know the law, and know what are valid acts of such artificial persons. They contract at their peril. The

assignee, as plaintiff herein, of a claim against such municipal corporation or public officer arising out of an alleged contract with the same, has the same notice as the original contractor. He knows the character, powers, and constitution of the contractor. (See cases last cited.)

If the contract in question were void, the plaintiff cannot recover thereon. The only authority that the commissioners of Custer County had to make the contract is found in the statutes above cited.

We observe, *in limine*, that the chapter of the Revised Statutes from which the citations *supra* are made is entitled "Poor," and the original act is entitled "An act to provide for the support, care, and maintenance of the county sick and poor," approved February 11, 1876.

In viewing the whole act, we are of opinion that the intent of the law is easily ascertainable. The county is to care for "poor persons who shall be unable to earn a livelihood in consequence of bodily infirmity," etc. The statute does not command the county to care for the "poor" simply. If so, the State would readily become a popular place of residence for the healthy, able-bodied, lazy beggars of the world. If one be poor in purse, but wealthy in brawn or brain, he is not to be a charge upon the county. The statute, section 962, *supra*, provides that when a person properly in charge of the county ceases to be "sick and infirm," although he still remain "poor," he shall no longer be maintained by the county; and to guard against fraud and imposition by physically vigorous paupers and dishonest contractors, it is provided that the county physician shall examine such persons, and, if they be able physically to take care of themselves, return them to their own resources. (§ 962, *supra*.) This is a plain declaration of the law that the county commissioners shall not support and care for persons whose only claim on public bounty is their poverty. To give them such a claim other ills must be present. They must be unable to earn a livelihood by reason of sickness, infirmity, or other cause; and they must have come to their deplorable state by misfortune, and not by vice. (§ 956, *supra*.) It was never contemplated that the State should care for all the poor, without regard to the condition of such poor as to ability, health, strength, and

virtue. The purview of the statute is clearly against such a construction.

We are therefore of opinion that the alleged contract between John Clark and the commissioners of Custer County for the care of the poor of the county is void.

Again, the contract to care for the sick and infirm is equally obnoxious to objection. We cannot construe the statute as requiring or authorizing the county commissioners to care for the "sick and infirm," as such alone. The wealthy and the well-to-do "sick and infirm" must care for themselves, from their own opulence or competency, and not live upon the taxes collected from their neighbors. Sickness and infirmity, under the statute, confer no claim upon the State. It is only when they are joined with poverty that the claim arises that is supplied from the store-house of a bountiful State.

We come, therefore, to the conclusion that the contract between John Clark and the commissioners of the county for the care of the sick and infirm was wholly unauthorized by the law, and void. (*Johnson v. Santa Clara County*, 28 Cal. 545; *City of Alton v. County of Madison*, 21 Ill. 115.)

We have above noticed that the defendant county alleges fraud and collusion between John Clark, the plaintiff, and the county commissioners, in the matter of these contracts. The face of the record of the proceedings of the board of commissioners is the only evidence under this allegation, and by that the letting of the contract seems to be a cunningly devised fable to avoid the plain intent of the law. This view is not altered when we observe that the poor at the poor-house cost \$13.50, and the sick and infirm nearly \$6,000. The contract that the commissioners were authorized to let was one for the care of such persons as were poor, and therewith sick and infirm. What they did do was an evasion of the plain intent of the law, and their alleged contract is void. No recovery can therefore be had under plaintiff's first cause of action.

It is unnecessary to examine the case further. The judgment and the order denying the new trial must be reversed, and the case remanded; and the same is hereby ordered. This court cannot order judgment entered in the District Court, as appellant requests. Appellant pleads and insists upon a counter-

claim larger than the plaintiff's demand. The judgment of the court below was for less than the plaintiff's demand. It is impossible for this court to say whether the jury cut down the demand of the plaintiff, or allowed a portion of the counter-claim. To determine this matter, the case must go back to the District Court for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

FIRST NATIONAL BANK OF HELENA, RESPOND- ENT, v. ROBERTS ET AL., APPELLANTS.

EJECTMENT — Pleading — Motion to make more specific. — A complaint in ejectment which avers that at the time set forth "the plaintiff was the owner, seised in fee, and entitled to the possession" of the premises described, and avers that "while plaintiff was so seised, the defendant, upon the ——— day of March, 1889, without right or title, entered into possession of the demanded premises, ousted and ejected the plaintiff therefrom, and wrongfully withholds the possession thereof from plaintiff to its damage in the sum of five hundred dollars," contains sufficient averments of title and ouster, and a motion to make more specific was properly denied. (Cases of *McCauley v. Gilmer*, 2 Mont. 202; *Billings v. Sanderson*, 8 Mont. 205, cited.)

SAME — Answer — Defense — Motion to strike out. — An averment in an answer to a complaint in ejectment that the plaintiff, a national bank, had no legal capacity to take a deed to the premises in controversy, by reason of the provisions of the laws of the United States governing national banks, is not a defense available to the defendant, and was properly stricken out on motion of plaintiff.

PRACTICE — Motion for a new trial — Sufficiency of specification of particulars. — Where the specifications of particulars, in which the evidence is insufficient to justify the verdict, are merely statements of the conclusions of the appellant that the evidence shows facts contrary to the findings of the jury, and no variance between the facts found by the jury and the evidence is pointed out, and no specification that any fact found by the jury is not sustained by the evidence, with the particulars in which the evidence is insufficient, they are not such specifications as required by subdivision 8 of section 298 of the Code of Civil Procedure.

NOTARY PUBLIC — Interpretation of statutes. — Section 547 of the Code of Civil Procedure, which provides that a judge shall not act as such in an action or proceeding to which he is a party, or in which he is interested, when he is related to either party by consanguinity or affinity within the third degree, or when he has been attorney or counsel for either party in the action or proceeding, applies to a judge of a court, and does not include notaries public, nor apply to their actions in taking and certifying an acknowledgment to a deed.

SAME — Acknowledgments — Instructions. — The acknowledgment of a deed is valid when taken by a notary who is the attorney and nephew of a party, who, though active in procuring its execution, is neither a party to the deed nor beneficially interested in its execution or delivery; and instructions which assumed that the deed was executed for the benefit of such party were properly refused.

9	323
18	359
13	361
23*	718
34*	27
34*	28
9	323
16	200
9	323
18	531
19	493
9	323
20	145
9	323
123	26
9	323
27	534
9	323
28	562
9	323
29	332
9	323
32	327

Appeal from First Judicial District, Lewis and Clarke County.

The cause was tried before BLAKE, C. J.

R. G. Davies, and G. W. Murphy, for Appellants.

The court erred in refusing to give instructions 7 and 8 asked by the defendants, to wit: 7th. "That if you believe from the evidence that the notary, A. K. Barbour, who took the acknowledgment of the deed, was the attorney and nephew of S. Hauser, for whose benefit it was made, and that said Barbour was a member of the firm of Bullard and Barbour, attorneys, who had charge of the procurement of the said conveyance, and that they, as such, were personally interested in the said conveyance, you should treat the acknowledgment void." 8th. "If you believe from the evidence that Bullard and Barbour were employed as attorneys for Hauser to obtain the conveyance from the defendants of the land in controversy, and that by his direction they took the deed in the name of Bullard as grantee for his benefit, and that Barbour, in pursuance of such employment, and as his attorney, took the acknowledgment, then you should treat the acknowledgment as void." As to Barbour's incapacity to take the acknowledgment. We insist that the taking of an acknowledgment of a married woman is a judicial act, and that any other doctrine is contrary to the weight of American and English authority, and especially in the case where the examination and acknowledgment is *the execution of the deed*. (*Montana Nat. Bank v. Schmidt*, 6 Mont. 610; *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44; *Heeter v. Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46; *Williams v. Baker*, 71 Pa. St. 476; *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. Rep. 552.) The justice who takes and certifies the acknowledgment of the wife to a deed is acting judicially. (*Loudon v. Blythe*, 16 Pa. St. 532; 55 Am. Dec. 527.) The judge or justice acts judicially, not ministerially. (*Singer Manuf. Co. v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Jamison v. Jamison*, 3 Whart. 469; 31 Am. Dec. 536; *Johnston v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Jones v. Porter*, 59 Miss. 628; *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634; *Wambole v. Foote*, 2 Dak. 1.) *Lynch v. Livingston*, 6 N. Y. 422, seems to recognize a different doc-

trine, but in *Stevens v. Hampton*, 46 Mo. 404, Judge Bliss says, as to this case and another, *Kimball v. Johnson*, 14 Wis. 682, there is no real conflict. In the former case an ordinary single acknowledgment was held to be a ministerial act, and hence did not come under the prohibition of the action of judges or jurors who were relatives of the parties. (*National Bank v. Conway*, 14 Bank. Reg. 513; *Withers v. Baird*, 7 Watts, 227; 32 Am. Dec. 754; 1 Am. & Eng. Encycl. of Law, 145; *Drury v. Foster*, 2 Wall. 24; *Hitz v. Jenks*, 123 U. S. 297; *Harkins v. Forsyth*, 11 Leigh, 294; *Greene v. Godfrey*, 44 Me. 25; *Dolph v. Barney*, 5 Or. 191; *Banks v. Ollerton*, 10 Ex. 168-182.) If Barbour, the officer, acted in a judicial capacity, then his action is contrary to the provisions of the Montana statute, that "a judge shall not act as such, in any proceeding in which he is interested, when he is related to either party in the third degree, or when he has been attorney or counsel for either party in the proceeding." Also, "a judge shall not have a partner acting as attorney in any court." (Comp. Stats. fifth div. §§ 547, 549, 550.) Barbour was certainly interested in the deed. He was looking after the interest of his client, Hauser, and his employment had reference not alone to the judicial duty of taking the acknowledgment, but this proceeding had reference to the case in which he was attorney for Hauser, in the settlement of which this deed was to cut an important figure. He was also related to Hauser in the third degree. As to the nature of the interest which will disqualify, see *Wilkowski v. Halle*, 37 Ga. 682; 95 Am. Dec. 374; *Tillinghast v. Walton*, 5 Ga. 335; approved in *Glanton v. Griggs*, 5 Ga. 429. A person interested in a deed cannot take the acknowledgment. (*Stevens v. Hampton*, 46 Mo. 404; *Wilson v. Trear*, 20 Iowa, 231.) An acknowledgment taken by a trustee in a deed is void. (Proffatt on Notaries, p. 33; *Groesbeck v. Seeley*, 13 Mich. 329.) An attorney for a party to a suit cannot take an acknowledgment or affidavit. (*Taylor v. Hatch*, 12 Johns. 340; Jones on Chattel Mortgages, 249.) In taking the acknowledgment of a married woman the officer is certainly acting in a judicial capacity, as it is necessary for him to examine her as to certain facts, the truth of which it is necessary for him to verify before he can take the acknowledgment, and he decides upon the effect

of the evidence which he takes upon this examination. (*Dodge v. Hollingshead*, 6 Minn. 1; 80 Am. Dec. 433.) An attorney cannot act as such in any other capacity with reference to a suit. (*White v. Haffaker*, 27 Ill. 349.) Devlin, in his work on Deeds (vol. 1, p. 584, and note), seems to take a different view; but the authorities cited by him have been overruled in Arkansas, and he follows New York as to an ordinary acknowledgment, but admits the judicial idea as to married women. The doctrine that this is a judicial act is laid down as the law in both Canada and England, and the following case holds that if there had been a disqualifying statute in Canada and England, as there is in Montana, that Barbour was disqualified: *Romanes v. Fraser*, 16 Grant, U. C. 67. There was no consideration between Roberts and the bank, or if so, the consideration was illegal. The bank had no right to make a contract to indemnify the sureties. A national bank could not take the title in this way. (See National Banking Law.)

Wade & Wallace, for Respondent.

None but the United States can object to a national bank taking a mortgage or trust deed, in the cases prohibited by the national banking law, or under any circumstances. (*Union Nat. Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439.) The complaint was the ordinary complaint of ejectment, and therefore defendants' demurrer and motion were wholly without merit. The first proposition urged by appellants is that the acknowledgment taken by Barbour, notary, was void; *first*, because of his relationship to Hauser; *second*, because of his being interested in the deed. The authorities cited by counsel to sustain his proposition that the taking of an acknowledgment by a notary is a judicial act, are inapplicable upon this proposition, and none of them in any manner sustain his contention that a notary, so acting, would be a judge within the meaning of the Montana Statutes, sections 547, 549, 550, fifth division, and the authorities cited, which are pertinent even to the former point, simmer down chiefly to those from the States of Pennsylvania and Mississippi; and in all of the authorities cited, save one or two, no question of the incapacity of the notary, from any

cause, was involved. We contend that the weight of authorities, as judged by the States, is adverse to the position that the act of the notary is judicial in this character, and in this view are upheld by the opinion of the eminent compiler of the American Decisions, Mr. Freeman, who in a note in the forty-first American Decisions, 168, expressly so states, and also by the following authorities: *Lynch v. Livingston*, 6 N. Y. 422; *Kimball v. Johnston*, 14 Wis. 672; *Biscoe v. Bird*, 15 Ark. 655; *Gill v. Fauntleroy*, 8 Mon. B. 177; *Odlorne v. Mason*, 9 N. H. 24; *Schultz v. Moore*, 1 McLean, 520. The notary, however, must certainly act in a ministerial capacity in Montana, for the reason that by the terms of the organic act of the Territory, all judicial functions and power is vested exclusively in the District Court, a Supreme Court, Probate Court, and in justices of the peace. That this is an exclusive grant of judicial power was expressly decided in *Custer County v. Yellowstone County*, 6 Mont. 39. Again, our Supreme Court has decided, that the certificate of acknowledgment, under our laws, is but *prima facie* and not conclusive evidence of its contents. And that the true distinction, as to whether the act of the notary is judicial or ministerial, is whether his certificate is conclusive or *prima facie* evidence, is expressly recognized, and is the distinction drawn in *Hitz v. Jenks*, 123 U. S. 305; while all of the authorities in Pennsylvania and Mississippi, holding the act of the notary to be judicial, base it upon the ground that his certificate is conclusive evidence of the contents, and unassailable to innocent third parties, and only assailable, as between the parties, upon the showing of fraud or imposition. The effort of counsel in upholding the judicial character of the act was to bring the notary, Barbour, within the inhibition of our statutes, *supra*. These sections have reference to the presiding judge of a court or judicial tribunal so acting, the word "judge" alone being used, and the context disclosing that it had reference to a judicial officer who could preside in an action or proceeding. The Georgia case cited by appellants has no application, on account of peculiar statutes, to the questions under consideration; besides, even were it otherwise, the practice has been so general and so common in this State, that the doctrine *communis error facit jus* would certainly prevail. The authorities cited by counsel are simply to

the effect that a grantee in a deed may not take the grantor's acknowledgment (which would disqualify Bullard, but not Barbour); and the theory and reasoning of the decisions are, that the disqualification exists because of actual interest in the premises conveyed. This is as far as the doctrine goes. Defenses of this character cannot be taken advantage of unless they are specially pleaded. (*Dolph v. Barney*, 5 Or. 208; *Greene v. Godfrey*, 44 Me. 25; *Hartly v. Frosh*, 6 Tex. 208; 55 Am. Dec. 772; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89.)

HARWOOD, J. — Appeal from the District Court in and for Lewis and Clarke County, First District of Montana. This is an action in the nature of ejectment, brought by the First National Bank of Helena, respondent, to obtain a decree for the recovery of possession of lots 1, 2, and 3, and the southerly 19½ feet front of lot No. 4, and lots Nos. 9 and 17, all in block 48, in the town site of Helena, Lewis and Clarke County, Territory of Montana, alleged to be unlawfully withheld from respondent by the appellants. The complaint avers "that on the twenty-seventh day of September, 1886, the plaintiff was the owner, seised in fee, and entitled to the possession" of the premises mentioned; that, while the plaintiff was so seised, the defendants, on the ——— day of March, 1889, without right or title, entered into possession of the demanded premises, ousted and ejected plaintiff therefrom, and unlawfully withholds the possession thereof from plaintiff, to its damage in the sum of \$500; that plaintiff demanded the possession of said premises, which defendants refused to surrender. The defendants appeared, and interposed a motion to require plaintiff to make its complaint more specific, and also demurred thereto; both of which pleadings were by the court properly overruled, and to which ruling defendants excepted. (*McCauley v. Gilmer*, 2 Mont. 202; *Billings v. Sanderson*, 8 Mont. 205; *Payne v. Treadwell*, 16 Cal. 220.)

The defendants then filed their answer, which, in effect, denied all the material allegations of the complaint, and in addition thereto alleged a series of transactions by way of further defense to the plaintiff's complaint. It is necessary, in the consideration of the questions brought here on appeal, to keep prominently in

view such new matter of defense, and the same is here condensed into the following statement: The defendants, further answering, say: That the said property is, and has been since 1867, the home and homestead of defendants and family. That on the tenth day of May, 1886, the defendant, W. K. Roberts, and one S. T. Hauser, and Dan E. Floweree were being sued by the commissioners of the county of Lewis and Clarke on a bond executed by said W. K. Roberts, as treasurer of said county, for an alleged defalcation of said defendant, as such treasurer, for the sum of \$42,000. That said defendant, W. K. Roberts, was also, at the same time, under indictment for embezzlement of the funds of said county to the amount of \$38,000. That Massena Bullard and Ashburn K. Barbour were the attorneys of said Hauser, and defending the said suit upon said bond for said Hauser, and also representing the plaintiff in regard to its liability to the said bondsmen, whom the said bank, without the knowledge of defendants, or either of them, had agreed to indemnify against all loss, if any, as such sureties on the bond of defendant, W. K. Roberts. That the consideration for such promise on the part of said bank to said sureties on said bond was to obtain the deposit of the funds of said county in said bank. That such deposits amounted to about the sum of \$800,000 during the time defendant was such treasurer, which funds were deposited in said bank, and used in the general business thereof. That the defendant, W. K. Roberts, not knowing of said agreement between the said bank and his sureties on his bond, and fearing that said sureties might be injured, and being pressed by said Hauser to give him security against loss as such surety, and being at the time in feeble health and of unsound mind, and said Mary Roberts, fearing that her husband, W. K. Roberts, would be imprisoned in the penitentiary, they were at length compelled to turn over all the property they possessed to the said Hauser to secure him against loss as such surety, which loss said Hauser led the defendant to believe would fall upon himself and his co-surety, Floweree. That said Hauser and said Bullard and Barbour, his agents and attorneys, conspired together to unlawfully injure defendants in respect to their estate, and prepared a deed for said property in fee-simple absolute, and inserted the name of said Bullard therein as grantee, and had

said Barbour attend to the execution thereof as notary public; the object being to obtain said land for the benefit of said bank without the knowledge or consent of defendants, and without any consideration therefor. That said Bullard and Barbour were employed, as a firm, to procure said deed, and for the protection of said bank. That said Bullard drew said deed, and said Barbour took the acknowledgment thereof, secretly concealing the fact from the knowledge of defendants that said deed of conveyance was made to said Bullard as grantee, and that the same was an absolute conveyance of said land, with warranty of title. That, in fact, the only object of defendants was to give security to said Hauser and Floweree, so far as said property might extend in value, for re-imbursement of any sum they might have to pay as sureties for defendant, W. K. Roberts, as aforesaid. The said sureties had a good defense to the action against them on the bond aforesaid. That the commissioners of said county became aware of that fact, and proposed a compromise to said sureties, Hauser and Floweree, for the sum of \$19,000, in full settlement of defendant, W. K. Roberts', alleged defalcation. And said Bullard and Barbour, as attorneys for Hauser, paid said sum without the knowledge or consent of defendants, or either of them, and said suit was dismissed. That the said compromise sum of \$19,000 was paid, in fact, by said bank, and not by said Hauser and Floweree. That thereupon said Bullard, in fraud of defendants' right, conveyed said property, on or about September 26, 1886, to said First National Bank by direction of said Hauser, president of said bank, and without the knowledge or consent of defendants. That at the time the said Barbour took the pretended acknowledgment of defendant, Mary J. Roberts, to said deed he did not explain the contents thereof to her, and she was never acquainted with the contents of the same, nor knew that said Bullard was grantee therein, until about the time this suit was instituted. That said deed was procured through fraud, duress, coercion, concealments, and fraudulent representations, and without adequate consideration, and under such circumstances that neither of them could withhold their consent. That said W. K. Roberts was not of sufficient mental capacity to execute said deed, and his mental disability was known to said Hauser and the plaintiff. That Hauser repre-

sented to said defendant, W. K. Roberts, in order to procure said deed, that he would not be disturbed in the possession of said property; which representation was relied on by said defendant, W. K. Roberts. That the said bank had no legal capacity to take a deed to said land, by reason of the provisions of the laws of the United States governing national banks.

The last allegation, denying the capacity of the plaintiff to take and hold said land, was by the court stricken from the answer, on motion of plaintiff; to which action defendant excepted. The action of the court on this point must be sustained as proper in an action of this nature. (*Union Nat. Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439.)

The plaintiff filed its replication, denying all the affirmative allegations of defendants' answer, except that portion stricken out; and, touching the transactions set forth in defendants' answer as new matter, plaintiff alleged: That both defendants had full knowledge of all the terms and conditions of said deed, and that the same was made to Bullard, as grantee, as a conveyance absolute, upon the consideration that said Hauser would settle said suit upon said bond with the commissioners of said county before the trial of the criminal action pending against defendant, W. K. Roberts, and also satisfy a mortgage debt for \$3,000 against said premises owing and due to one Perkins; and that said transaction was made in good faith, and at the request of defendants. That defendant was then in good health, with faculties unimpaired. That Bullard was named in said deed as grantee at the request of defendant, W. K. Roberts, and that Barbour took the acknowledgment of said deed at the request of defendants. That the property in question was then of the value of about the sum of \$5,000. That defendants then had other property standing in the name of defendant, Mary J. Roberts, which defendants proposed to include in and convey by said deed; but said Hauser declined to receive the same. That said Hauser and Floweree had no meritorious defense to the action of the said county against them as sureties on said bond. That a personal judgment had then been rendered against said W. K. Roberts, as principal on said bond, before said compromise. That the compromise was made at the solicitation of

defendant, W. K. Roberts. That said property was conveyed to said Bullard, as trustee, by express understanding with said Roberts, with direction to convey the same to whom Hauser directed, after the satisfaction of said judgment in favor of said county, and against said Roberts, in the sum of \$43,000, and the said mortgage debt of \$3,000 against said property owing to said Perkins.

The action was tried by the court and a jury upon the issues joined by the complaint, answer, and replication. The jury found a general verdict for the plaintiff, and also made special findings upon interrogatories submitted, in effect as follows: (1) That W. K. Roberts was, at the time he executed the deed to Bullard, of sufficiently sound mind to be responsible. (2) W. K. Roberts did not know, before he executed the deed to the property in controversy, that a settlement could probably be made with the county at fifty cents on the dollar. (3) That W. K. Roberts desired the settlement to be made. (4) That Hauser or the bank agreed, as a partial consideration for said deed, to pay the Perkins mortgage. (5) That the plaintiff bank paid thereon the sum of \$3,176.66 on September 16, 1886. (6) That Hauser or the bank agreed, as a partial consideration for said deed, to settle with the county commissioners, and obtain a full release of defendant Roberts from the said judgment then existing against him. (7) That the defendant, W. K. Roberts, knew that the deed was made to Bullard, and executed it with that knowledge. (8) That Mrs. Mary J. Roberts knew that the deed was made to Bullard, and executed and acknowledged it with that knowledge. (9) That Barbour, notary public, took the acknowledgment of the defendant, Mary J. Roberts, to two deeds, one dated May 11, and the other May 14, 1886. (10) That Barbour, notary public, explained the nature of the first-mentioned deed—that is, the deed conveying the property in controversy—to Mary J. Roberts, before she acknowledged the same. (11) That the plaintiff bank furnished sureties on Roberts' official bond, and he knew this. (12) That on September 11, 1886, the plaintiff bank paid, or caused to be paid, to Lewis and Clarke County the sum of \$19,125.70 in full settlement of the bond suit, and in discharge of the said judgment against defendant Roberts. (13) That the deed for the premises

in controversy was intended as a deed absolute. (14) That defendants had not decided, before executing the deed to Bullard, to move onto other property, and make a new home. (15) That before executing said deed the defendant, W. K. Roberts, knew of an agreement by the plaintiff to indemnify said sureties, Hauser and Floweree. (16) That said deed was not obtained from said Roberts by concealment of its terms, misrepresentation, or fraud.

Upon the verdict of the jury, judgment was rendered in favor of plaintiff, and against defendants, for the recovery of the possession of the premises in controversy. The defendants moved the trial court for a new trial, based upon a statement of the case; which motion was by the judge of that court heard and overruled, and the defendants appealed both from the order overruling the motion for a new trial, and from the judgment.

The grounds upon which defendants moved for a new trial are substantially two, included under the causes provided by statute, as follows: (1) Insufficiency of the evidence to justify the verdict, and that it is against law. (2) Errors in law occurring at the trial, and excepted to by defendants.

The appellants have set out at great length, and with much repetition, what they allege to be "specifications of particulars in which the evidence is insufficient to justify the verdict and particulars in which the verdict is against law." It may be said, generally, of the so-called "specifications of particulars in which the evidence is insufficient to justify the verdict," that they are not such specifications as required by the third subdivision of section 298 of the Code of Civil Procedure. They are merely statements of the conclusions of appellants that the evidence shows facts contrary to the findings of the jury. For example, the first alleged specification of "insufficiency" of evidence is as follows: "*First.* The evidence shows that the deed from defendants to Massena Bullard, dated May 10, 1886, and on which plaintiff relies, and relied at the trial, as necessary evidence of its title, was intended as a security for the payment of money to S. T. Hauser, and was not an absolute conveyance of the title to the land in controversy, but was a mortgage; and further shows that at the time when Bullard conveyed the land to plaintiff, the plaintiff had notice of the circumstances under which the deed was made to Bullard, and of the right of defendants." Here is

no specification of any particular in which the evidence is insufficient to sustain the verdict. The language quoted amounts to a declaration of conclusions at variance with the verdict of the jury, and nothing more. The so-called specification quoted is a fair sample of the alleged specifications under the head of "insufficiency of evidence to justify the verdict." Each one declares that "the evidence shows" certain enumerated facts or conclusions. It is true, these conclusions asserted by the appellants are contrary to what the jury found; but this is not what the Code contemplates by requiring the party who attacks the verdict of the jury, on the ground of insufficiency of evidence, "to specify the particulars in which the evidence is insufficient to justify the verdict." No variance between the facts found by the jury and the evidence is pointed out; no specification that any fact found by the jury is not sustained by the evidence, with the particulars in which the evidence is insufficient to justify the finding, is pointed out by these so-called specifications.

It is not the requirement of the statute that the statement shall declare that the evidence shows something different from what the jury found, because this would simply put the appellate court upon an inquiry as between the conclusions of the jury and the opinion of the appellant as to what the evidence shows. The statute requires that "the statement shall specify the particulars in which such evidence is alleged to be insufficient."

The statute of this State is identical with that of California upon the question of practice under consideration. The point has been considered in many cases in California, and many illustrations of good and bad practice in this particular are found collected from the California Reports, and discussed in the valuable work of Mr. Hayne on New Trial and Appeal. (§ 150.)

Notwithstanding the infirmity of the specifications of particulars in which the evidence is alleged to be insufficient to justify the verdict, the errors of law complained of by appellants, and especially the errors in giving and withholding certain instructions to the jury, are such that the court has, in this action, carefully examined and considered the evidence as presented by the record, and compared the same with the verdict of the jury. This examination of the evidence leads us to the conclusion that the findings of the jury, both general and special, are sustained

by the evidence. It is true the evidence, in some particulars, is conflicting; but where this is the case, it is the province of the jury to judge both as to credibility of witnesses and as to the weight of testimony, and find where the preponderance lies.

The errors of law complained of by appellants, and urged upon the consideration of the court, are apparently the only points relied upon by them as shown by the argument and authorities cited. The first error thus presented arises from the refusal by the trial court to give instructions numbered 7 and 8 to the jury, as requested by defendants. These instructions are as follows: "(7) That if you believe, from the evidence, that the notary, A. K. Barbour, who took the acknowledgment of the deed, was the attorney and nephew of S. Hauser, for whose benefit it was made, and that said Barbour was a member of the firm of Bullard and Barbour, attorneys, who had charge of the procurement of the said conveyance, and that they, as such, were personally interested in the said conveyance, you should treat the acknowledgment as void. (8) If you believe, from the evidence, that Bullard and Barbour were employed as attorneys for Hauser to obtain the conveyance from the defendants of the land in controversy, and that, by his direction, they took the deed in the name of Bullard, as grantee, for his benefit, and that Barbour, in pursuance of such employment and as his attorney, took the acknowledgment, you should treat it as void."

It appears from the evidence that Mr. A. K. Barbour, who, as notary public, took and certified the acknowledgment to the deed from defendants to Bullard, the plaintiff's grantee, was the nephew of S. T. Hauser, mentioned in this action. It also appears, from the evidence, that the same Bullard and Barbour were partners in the practice of law, and at the time attorneys, among others, employed on behalf of Hauser and Floweree, in said action of the county commissioners against them as sureties on the official bond of W. K. Roberts as treasurer of Lewis and Clarke County. That certain consultations had occurred between Hauser and Roberts, and lastly between Roberts, Hauser, and Bullard, wherein was considered and talked over the circumstances of the suit against Hauser and Floweree as sureties, and the judgment for \$43,000 against defendant, W. K. Roberts, in favor of the county, in which Roberts expressed himself as

anxious to have the settlement of said suit against his sureties and the judgment against him made, and proposed certain property, including that in controversy, to be put in, to the extent of its value, to consummate such settlement. That at the last-mentioned consultation Bullard was directed by Hauser and Roberts to draw the deed in question, conveying the property in controversy to Bullard, for the time being, with the understanding that when settlement of said judgment was made, and the same was canceled, and the said Perkins mortgage for \$3,000 on said premises was paid, then Bullard should deliver a conveyance of said property to whom Hauser should direct. That immediately following this last-mentioned interview of the parties named, said Bullard gave the said Barbour a description of the land in controversy, and requested him to draw a deed conveying the same from defendants to Bullard, and see to the proper execution and acknowledgment of such deed by defendants as grantors.

There may be some contradiction between the witnesses of the respective sides of this controversy as to some of these statements. The jury has found upon these facts generally, and upon many of them specially, and we refer to them to place the plaintiff and said Hauser, Bullard, and Barbour, and defendants Roberts and wife in the attitude they respectively occupied to this transaction, for the purpose of considering the relationship of Barbour to Hauser as nephew, and the relationship of Bullard and Barbour to Hauser as his attorneys, in reference to this relationship disqualifying Barbour from acting as notary public in taking the acknowledgment to said deed.

The appellants contend that the relationship of Barbour to Hauser, as nephew and attorney, in law disqualified him to act as the officer to take and certify the acknowledgment of the defendants to the deed in question; and that herein the trial court erred in refusing to give the jury said instructions Nos. 7 and 8.

The learned counsel for appellants contends that the act of taking and certifying the acknowledgment to the deed in question was judicial in character, and consequently, by reason of Barbour's relationship to Hauser, both by blood and as attorney, disqualified him, under the statute, to take and certify the

acknowledgment of defendants to said deed, and the same was void. The counsel for appellants has sought, apparently with much industry and research, to establish the point that the act of a notary public, or other qualified officer so to do, in taking and certifying an acknowledgment of a married woman to a deed, is a judicial act; that is, in making the examination, and certifying the fact required by law to be certified, the officer exercises a judicial function. In an examination of authorities on this question (of which there are many), we do not find that courts have held this doctrine without qualification.

Looking back to the common law, we find that one method of extinguishing title to land was by what is termed "a fine." This was accomplished anciently by a real action in a court of record, which in process of time became a fictitious action. Nevertheless, it was a proceeding in a court of record; and consequently the proceedings, and record thereof, could properly be termed "judicial." Blackstone describes this proceeding in the following passage: "A fine is sometimes said to be a feoffment of record, though it might with more accuracy be called an acknowledgment of a feoffment on record; by which it is to be understood that it has at least the same force and effect with a feoffment in the conveying and assuring of lands, though it is one of those methods of transferring estates of freehold by the common law in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices, whereby the lands in question became, or are acknowledged to be, the right of one of the parties. In its original it was founded on an actual suit commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual that fictitious actions were, and continued to be, every day commenced for the sake of obtaining the same security." The commentator further remarks that "fines, indeed, are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton, in the reigns of Henry II. and Henry III., as things

then well known and long established." (2 Cooley's Blackst. Com. 348; Co. Litt. 262 a.)

This is readily seen to be the prototype of the more modern method prescribed by statute; but these statutes have changed the common-law form by providing for an acknowledgment of certain facts as to the execution of the conveyance before an officer empowered by law to examine as to the facts, and certify the same officially; and this power is not, in all cases, even confined strictly to judicial functionaries.

The cases in which courts have used language to the effect that the act of the officer in taking and certifying an acknowledgment of a married woman was judicial, is found to be where the court was considering whether the certificate by the officer imported absolute verity as to the facts certified, i. e., was conclusive of the facts certified, so far as the law required the certificate to go, or whether the certificate was only *prima facie* evidence of the facts stated therein.

It appears that the decisions are not in harmony upon this point. In some cases the language used shows clearly that the court was reasoning by analogy from the common-law form of fine, and its effect on the statutory form of taking and certifying an acknowledgment and its effect. In some such cases the language goes far towards stamping the latter act as judicial in its nature; but in all these cases a close examination will show that the burden upon the judicial mind was not to decide between the mere terms by which the act should be designated as "judicial," "quasi-judicial," or "ministerial," but to decide as to whether the certificate should be conclusive, or only *prima facie* evidence of the facts stated therein. No such consideration is here involved. This question, as to what weight shall be given to the officer's certificate of acknowledgment, is set at rest by section 265, division 5, Compiled Statutes, which provides as follows: "Neither the certificate of the acknowledgment nor the proof of any such conveyance or instrument, nor the record, nor the transcript of the record, of such conveyance or instrument, shall be conclusive; but the same may be rebutted." This has been the statute law during the whole period covered by the transactions in controversy.

Counsel for appellants contend that the act of a notary public

in taking and certifying an acknowledgment to a deed is judicial in character, and that the point applies to the case at bar in this: (1) That the deed in question was made for the benefit of Hauser. (2) That the acknowledgment thereto was taken and certified by Barbour, who was nephew of and attorney for Hauser; and hence the acknowledgment was void, under the provisions of section 547 of the Code of Civil Procedure, as follows: "A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; or when he has been attorney or counsel for either party in the action or proceeding." (3) That said instructions Nos. 7 and 8, refused, ought to have been given as applying this statute to the facts in the case at bar. This provision is found in chapter ix., first division, Compiled Statutes, which treats of courts of justice belonging to the judicial system as provided for the Territory of Montana by act of Congress. To properly construe this statute only requires to look at the context, at its own terms, and at some other provisions of the Code of Civil Procedure. The first section of the Code provides that "there shall be . . . but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity." The second section of the Code of Civil Procedure provides that "in such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant." Here the terms "action" and "party" are defined. The term "judge," as used in section 547, *supra*, occurs many times in said chapter. In the next section (548) it is provided as follows: "A judge shall not act as attorney or counsel in a court in which he is a judge, or in an action or proceeding removed therefrom to another court for review, or in any action or proceeding from which an appeal may lie in his own court." The term "judge," in section 547, undoubtedly refers to the judge of a court of justice; and the verb "act," as there used, refers to the exercise of judicial functions in an action or proceeding pending therein.

In view of the very plain and expressive terms of the statute, that "a judge shall not act as such in an action or proceeding,"

etc., we are of opinion that the statute applies to a judge of a court; and that the term "action or proceeding," used in said section, refers to actions and proceedings in courts of justice, as provided for in the Code of Civil Procedure. (§ 1907, Rev. Stats. U. S.; *Custer County v. Yellowstone County*, 6 Mont. 39.) And it seems clear to us that this statute does not include notaries public, nor apply to their actions in taking and certifying an acknowledgment to a deed.

Said instructions Nos. 7 and 8 were properly refused by the trial court, not only for the reasons above expressed, but for the more forcible reason that Hauser was neither shown to be a party to the deed in question, nor beneficially interested in its execution and delivery. If the deed had been made to Hauser as a party to it, or had even been made for his use and benefit, and the acknowledgment thereto by the grantors had been taken and certified by Hauser's nephew and attorney, then the question raised by counsel for appellants would have been more pertinent.

It is shown by the evidence and findings of the jury that the plaintiff bank had, in the first instance, procured the sureties, Hauser and Floweree, on the official bond for Roberts; and that the bank had indemnified these sureties against loss as such; and that the bank was the party in interest as to the loss by reason of recovery against the sureties on said official bond; and that Roberts, the principal on the bond, knew these facts before the deed was executed. The jury also found that the consideration for the conveyance of said property was the agreement that Hauser or the bank would pay and have canceled said judgment against Roberts for \$43,000, and the Perkins mortgage debt of \$3,000, and that this was done by the plaintiff bank. Then, who was the party beneficially interested in having said conveyance made? If the testimony of witnesses and the findings of the jury be true, then Hauser was neither benefited by the conveyance, nor would he have suffered loss by the withholding thereof, for he was indemnified by the bank against loss as surety. Looking at the position of the parties to the transaction, it seems plain that the parties benefited by the conveyance were the bank and defendant Roberts. It is true, Hauser, being one of the sureties on the bond and the

president of the bank, took an interest in arranging a settlement which was finally consummated.

The appellants further insist, (1) that the deed in controversy was intended as a mortgage, and should have been so construed; (2) that said deed was an executory contract or bond to convey the land in question; (3) that the deed was a power of attorney to Bullard to convey the land in controversy. All these propositions, as applied to the case at bar, are questions of fact. After a searching trial on the allegations set up in the pleadings, the jury found that the deed was intended as an absolute conveyance.

It is therefore adjudged that the order and judgment of the court below be affirmed, with costs.

DE WITT, J., concurs.

FLAKE, C. J., did not sit in this case, having been trial judge in the court below.

BARBER, RESPONDENT, v. BRISCOE, APPELLANT.

JUDGMENTS NUNC PRO TUNC — Amendment. — A judgment entered at a former term may be amended by the trial court by inserting the plaintiff's true name, and may be entered *nunc pro tunc* as amended. (Cases of *Comanche Mining Co. v. Rumley*, 1 Mont. 201; *Territory v. Clayton*, 8 Mont. 1; *Keene v. Welsh*, 8 Mont. 305, cited.)

SAME — Interest. — Under section 1237, fifth division, Compiled Statutes, providing in substance that creditors shall be allowed to collect and receive interest on any judgment from the day of entering up such judgment, a judgment entered *nunc pro tunc* bears interest from the date on which the judgment is to be regarded as entered.

SUPPLEMENTARY PROCEEDINGS — Appealable orders. — An order denying a motion to set aside an order for an examination of a judgment debtor upon proceedings supplementary to execution is an appealable order. (Case of *Sperling v. Calfee*, 7 Mont. 514, cited.)

SAME — Validity of proceedings. — Where no judgment had been entered or valid execution issued at the time of an order for the examination of a defendant on proceedings supplementary to execution, the proceedings are irregular, and cannot be cured by the subsequent entry of a judgment *nunc pro tunc*.

Appeal from First Judicial District, Lewis and Clarke County.

Defendant's motion to set aside the order for his examination on proceedings supplementary to execution was denied by HUNT, J., who ordered judgment *nunc pro tunc* for the plaintiff.

9	341
11	327

9	341
14	207
23*	726
36*	194

A. A. Lathrop, and Walsh & Newman, for Appellant.

Until judgment was formally entered of record no valid execution could issue, and no supplementary proceedings could be brought to enforce performance. It is only actual final judgments that may be enforced by execution. A mere order for a judgment, although judgment may afterwards be perfected thereon, will not authorize the issuing of execution. (4 Wait's Practice, § 2.) "The party in whose favor judgment is given may at any time within six years after the entry thereof issue a writ of execution for its enforcement" (§ 312, Code Civ. Proc.; *In re Cook*, 77 Cal. 221.) The effect of a judgment entered *nunc pro tunc*, as of a former date to that of its actual entry, is said to be retroactive to cure defects existing because of the absence of a judgment on the record. The very fact that courts have adopted this practice proves a necessity for it, showing that an existing error requires a cure. As in this case, as appellant urges, there being no judgment of record, no valid execution could be issued; an execution having been issued, its life spent, and the paper returned to the files, a dead instrument of the law, the *nunc pro tunc* judgment could not put new life into it; that it made a valid judgment upon the verdict rendered December 8, 1887, is not necessary to touch upon in this connection, but it could not make valid past proceedings. Appellant had the right to proceed on his business until respondent had his judgment properly entered of record; he had a constitutional right to refuse to recognize an invalid execution. There had not been "due process of law," and he could not be bound to surrender his property without its full fruition. The court erred in ordering that judgment should bear interest from date of rendition of verdict, December 8, 1887. Section 1237, General Laws, provides that creditors shall be allowed interest "on any judgment rendered before any court authorized to enter up the same from the day of entering up such judgment. . . ." Common-law judgments did not bear interest. This provision must be strictly construed, and the judgment creditor can only be benefited to the extent given by strict construction of the statute. (*McLaughlin v. Doherty*, 54 Cal. 519; *Gray v. Palmer*, 28 Cal. 416.) In this case when

was the judgment actually entered on the judgment book? November 21, 1889. No retroactive retrospect *nunc pro tunc* judgment could cause this judgment to be actually entered on the judgment book prior to November 21, 1889.

McCutcheon & McIntyre, for Respondent.

Appellant has once before appealed this case to the Supreme Court. (*Barber v. Briscoe*, 8 Mont. 214.) To have done so he must have acted upon the assumption that judgment was duly rendered and entered. It therefore does not lie in his mouth to say that this assumption of his was incorrect; he is estopped from asserting the contrary. The maxim *allegans contraria non est audiendus* is directly applicable to his present contention. (1 Herman on Estoppel, §§ 13, 14; *Chaquette v. Ortet*, 60 Cal. 600; Bigelow on Estoppel [3d. ed.], pp. 601, 603.) But if this be not so, and final judgment was not had in this action on the verdict of December 8, 1887, until November 21, 1889, then we submit that no appeal lies from the orders complained of by appellant. Such orders are not included in those from which an appeal will lie under the statute. (Comp. Stats. 174, § 421, subd. 2.) The second appeal herein is from the order of November 21, 1889, ordering judgment in this action *nunc pro tunc*. It will be observed that this order is based entirely upon the records of the case, and was for the purpose of correcting an evident misprision of the clerk of the court in not entering judgment as he was ordered to do, and as the statute required him to do. (Comp. Stats. 138, § 302.) That this order was correct we call the attention of the court to the following authorities: *Comanche Mining Co. v. Rumley*, 1 Mont. 205; *Territory v. Clayton*, 8 Mont. 16; *Keene v. Welsh*, 8 Mont. 305; Freeman on Judgments (3d. ed.), §§ 56, 61, 64; *Howell v. Morlan*, 78 Ill. 162; *Mays v. Hassell*, 4 Stewt. & P. 222; 24 Am. Dec. 750; *Adams v. Higgins*, 23 Fla. 13; *Dreyfus v. Tompkins*, 67 Cal. 339. Respondent is entitled to statutory interest on this judgment. A judgment entered *nunc pro tunc* must be everywhere received and enforced in the same manner and to the same extent as though entered at the proper time. It makes the judgment of the same effect as if the defects on account of which it was amended had never existed. (Freeman

on Judgments [3d. ed.], § 67; *Adams v. Higgins, supra.*) Plaintiff is entitled by statute to interest on his judgment, and the negligence of the proper officer of the court to perform the duty devolved on him by law cannot prejudice his rights. A further effect of the entry of the judgment *nunc pro tunc* is to validate the execution, and necessarily the proceedings based thereon, previously issued in the case, especially where rights of third parties have not intervened, as in the case at bar. (Freeman on Judgments [3d. ed.], § 67; *Adams v. Higgins, supra.*)

BLAKE, C. J.—The complaint in this action contained the name of “Sumner J. Barber” as the plaintiff, but the summons described him as “Samuel J. Barber,” and notified the defendant of the amount sought to be recovered “upon a certain promissory note made and executed by said defendant on the twenty-fourth day of July, 1885, at Kane Station, Idaho Territory.” At the trial, upon the eighth day of December, 1887, the jury returned a verdict for the plaintiff, who is styled “Sumner J. Barber.” After the record of the verdict, the following entry appears: “Thereupon it is ordered that judgment be entered accordingly. Defendant, by counsel, excepts to the rendition of judgment, and gives notice of intention to appeal.” An *alias* execution was issued May 27, 1889, which recited that Samuel J. Barber recovered a judgment December 8, 1887, against John O. Briscoe, and that “the judgment roll in the action in which such judgment was ordered is filed in the clerk’s office, . . . and the said judgment was docketed in said clerk’s office.” The return of the sheriff shows that he has been unable to find any property of Briscoe.

Afterwards an affidavit of the attorney of “Samuel J. Barber” was filed in the court below, which stated “that on the eighth day of December, 1887, the plaintiff recovered a judgment in said action in said court against the defendant, John O. Briscoe, . . . which judgment was duly entered and docketed in the office of the clerk of said court; . . . that there now remains unpaid on said judgment the whole amount thereof.” Upon these and other recitals, the judge of the court below made an order, November 2, 1889, for the examination of said Briscoe,

under the provisions of the Code of Civil Procedure concerning proceedings supplementary to execution.

A motion was filed November 13, 1889, by said Briscoe to set aside the foregoing order. Upon the following day the plaintiff moved the court "to amend the judgment and all subsequent proceedings in said cause by inserting plaintiff's true name, 'Sumner J. Barber' in lieu of 'Samuel J. Barber.'" The court overruled the first and sustained the last motion November 20, 1889.

On the succeeding day, on motion of the plaintiff, this order was made in the court below: "It is ordered that judgment be entered herein as of the eighth day of December, A. D. 1887, on the verdict rendered herein on the said eighth day of December, A. D. 1887, for the sum of two thousand one hundred and forty-seven and sixty one-hundredths dollars (\$2,147.60), and costs of suit; and that said judgment bear interest at the rate of ten per cent per annum from the said eighth day of December, A. D. 1887." In pursuance of this order, a formal judgment *nunc pro tunc* was entered on the aforesaid verdict in accordance therewith. Up to this time no other proceedings had been had in the matter excepting those which have been mentioned in this statement of the facts.

The action of the court below in authorizing the amendment by inserting the true name of the plaintiff in the papers, and the entry of the judgment *nunc pro tunc*, is upheld by the decisions of this court, and will not be further discussed. (*Comanche Mining Co. v. Rumley*, 1 Mont. 201; *Territory v. Clayton*, 8 Mont. 1; *Keene v. Welsh*, 8 Mont. 305.)

The contention of the appellant is that the court erred in its order that the judgment should bear interest from the eighth day of December, 1887. The statute provides that "creditors shall be allowed to collect and receive interest . . . on any judgment rendered before any court or magistrate authorized to enter upon the same, within the Territory, from the day of entering up such judgment until satisfaction of the same be made." (Comp. Stats. div. 5, § 1237.) It is admitted that judgments at common law did not bear interest, and that this statute must be construed strictly. What was the effect of the entry of the judgment *nunc pro tunc* upon the day from which interest can

be collected by the respondent? In *Tapley v. Goodsell*, 122 Mass. 183, Chief Justice Gray says: "The technical difficulty of holding the judgment to be binding as of a date before it actually existed is no greater than has always attended every judgment rendered *nunc pro tunc*, and every judgment which took effect by legal relation at an earlier day than that at which it was actually entered. As Lord Mansfield was accustomed to observe, fictions of law can never be contradicted so as to defeat the ends and purposes for which they were invented. . . . In the case at bar, the judgment, having been legally rendered as of the former term, has the same operation for all purposes necessary to make it effectual, as if it had been then actually entered." Mr. Freeman states the law in the following terms: "The entry of judgments or decrees *nunc pro tunc* is intended to be in furtherance of justice. It will not be ordered so as to affect third persons who have acquired rights without notice of the rendition of any judgment." (*Wells v. Gieseke*, 27 Minn. 478; *Auerbach v. Gieseke*, 40 Minn. 262.) No question of this kind arises in this case. Mr. Freeman proceeds: "With the exception pointed out in the above section, a judgment entered *nunc pro tunc* must be everywhere received and enforced in the same manner, and to the same extent as though entered at the proper time." (Freeman on Judgments, §§ 66, 67.)

The case of *Fugua v. Carriel*, Minor, 170, which was decided in 1823 by the Supreme Court of Alabama, seems to be in point. The facts are not fully reported, and we use this qualified language. It appears that this was an action upon a promissory note; that a default was taken at one term, and that at the next a judgment *nunc pro tunc* was entered, which included interest. A writ of error was prosecuted, and the question under consideration was not presented, but the opinion treats the right to recover the interest as a matter of course, although the mode of computation, according to the tenor of the note, was adjudged erroneous.

The application of these principles requires us to determine that the "day of entering up" the judgment, which is specified in the statute regulating the rates of interest in Montana, is the time which is finally fixed by the courts therefor. When it was ordered that judgment should be entered for the principal sum

upon the eighth day of December, 1887, the statutory interest followed as a legal consequence.

It is insisted that the court erred in denying the motion to set aside the order for the examination of the appellant in the proceedings which have been detailed. The respondent suggests that no appeal can be taken in this matter, if the appellant is correct in his position that no judgment was in force when these proceedings were initiated. We are obliged to review the case as it appears in the record, and the respondent invoked the action of the court, and stated in his affidavit the facts which conferred jurisdiction, and caused the order to be made. He has obtained a ruling in his favor, and cannot complain of its legitimate results, and the order before us is appealable. (*McCullough v. Clark*, 41 Cal. 298; *Hagerman v. Tong Lee*, 12 Nev. 334. See, also, *Sperling v. Calfee*, 7 Mont. 514.)

The chapter of the Code of Civil Procedure relating to "proceedings supplementary to execution" provides that "after issuing an execution against property, and upon proof by affidavit by a party or otherwise, to the satisfaction of the court, or a judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, before such judge or referee appointed by him, to answer concerning the same." (Code Civ. Proc. § 351.) Under this statute, and the circumstances which have been narrated, the above order was made. When the appellant filed his motion, no judgment had been entered in the action, no valid execution had been issued and returned, and Briscoe was not a judgment debtor. Before passing upon this motion, the court, upon the application of the respondent, ordered that the judgment should be entered *nunc pro tunc*. Did this action render the proceedings legal and regular? The general principles of law, which are given by the authorities, do not contain any exceptions, and it is claimed that the judgment which was actually entered cured all the defects which have been pointed out. The court below was convinced by this argument, and acted accordingly.

We think that a different doctrine is applicable and decisive of this question. In *Earl v. Skiles*, 93 Ind. 178, the court says:

“To reach the funds of the judgment debtor in the hands of third parties, the affidavit and proof must conform substantially to the requirements of the statute. This proceeding is a remedy extraordinary in character. . . . Hence the statute, among other things, requires the affidavit to show that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment. . . . In this regard the affidavit and proof are wholly wanting. . . . For these reasons, we are of the opinion that appellants failed to make a case, either by their affidavit or proof.”

In *Wegman v. Childs*, 44 Barb. 403, the court says: “In order to sustain this action, the plaintiff is bound to show, not only the judgment, but also an execution from a court having the right to issue it, and that the same was delivered to the sheriff of the proper county, and by him returned unsatisfied. Without each and all of these being proved, the judge had no jurisdiction to entertain proceedings supplementary to execution. . . .” (See, also, *Flint v. Webb*, 25 Minn. 263; *Lynch v. Johnson*, 48 N. Y. 33; *Adams v. Hackett*, 7 Cal. 201; *Byrd v. Badger*, 1 McAll. 443; *Pacific Bank v. Robinson*, 57 Cal. 522; 40 Am. Rep. 142; *Sperling v. Calfee*, *supra*.)

The cases show that these proceedings were intended as a substitute for the creditors' bill as formerly used in chancery. The court says, in *Pacific Bank v. Robinson*, *supra*: “After a judgment creditor had exhausted his remedy at law, by the issuance of a *fiери facias*, which was returned *nulla bona*, he had the right to invoke the jurisdiction of a court of equity to aid him, upon the principle of compelling a discovery of assets, tangible or intangible, and applying them to satisfying his execution.” The matters in which the informality or irregularity of process is involved cannot be cured by the entry of a judgment *nunc pro tunc*, but the question to be decided is of the gravest importance—the jurisdiction of the court. We have seen that the practice, both in chancery and under the statute, required the existence of certain facts to obtain similar relief. The jurisdiction of the court below to make this order depended upon the circumstances which could then be proved, and could not be controlled by a judgment given subsequently. The motion to set aside the order should have been sustained.

It is therefore adjudged that the cause be remanded, with directions to set aside the order made upon the second day of November, 1889, and that the judgment entered *nunc pro tunc*, upon the eighth day of December, 1887, be affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

PIERCE, RESPONDENT, v. TEN EYCK, APPELLANT.

9	349
31	300
9	349
34	179

PARTNERSHIP — Dissolution — Accounting. — Where one of two equal partners collects a private debt of his copartner, giving him no credit therefor, and uses it in the firm business, he is liable to his copartner for one half of such debt, though he has sold to him his entire interest in the firm business and partnership property.

SAME — Dissolution by purchase of interest. — Where one partner contributed a greater share to the firm than the other, which it was agreed should be deducted upon a dissolution, and subsequently terminates the partnership by a purchase of the other's interest, without reservation of any demands, he cannot recover the sum so contributed in excess, as the purchase operated as a relinquishment of such a claim.

SAME — Purchase of interest — Negligence. — Where it appeared in the case at bar that the purchasing partner voluntarily bought his copartner's interest when he feared the books were wrong and had not been properly kept, and afterwards discovered that he had paid a greater sum for such interest than he would have done had he known the true condition of the books. *Held*, that he could not recover such excess from the selling partner, having been negligent in purchasing upon the showing of books which he believed to be erroneous.

SAME — Accounting — Contracts between partners. — In the case at bar it was agreed between the plaintiff and defendant, who were partners, that during the absence of the defendant, who was to leave the business for three months, the firm should be credited with fifty dollars per month to compensate for defendant's loss of time. No such credit was ever given. *Held*, that plaintiff's claim for his share of such credit was extinguished by the purchase of defendant's interest.

Appeal from First Judicial District, Jefferson County.

The testimony was taken before a referee, who found the plaintiff entitled to judgment for the sum of \$1,131.02. Judgment was rendered in accordance with the report of the referee, and defendant's motion for a new trial was overruled by McCONNELL, C. J.

G. O. Freeman, M. S. Gunn, and McConnell & Clayberg, for Appellant.

The purchase by plaintiff of defendant's interest in the copartnership was made with full knowledge that there were omissions

in the books, and with absolute knowledge of the errors and omissions in the particular items upon which he recovered in this action. Plaintiff's own testimony shows that he knew the books were wrong, especially in regard to those items upon which judgment was awarded in this action, and therefore he was placed upon his notice, and it was his duty to have made an investigation of the books, or had it done for him, and as he did not, but bought defendant's interest for a specific sum with this knowledge, he cannot now claim fraud by reason of misrepresentations by defendant, or of the incorrectness of the books themselves. (*Parsons v. Hughes*, 9 Paige, 591; *O'Dell v. Rogers*, 44 Wis. 181; 2 *Parsons on Contracts*, 772; *Adams v. Sage*, 28 N. Y. 103.) Even though it were true that plaintiff had no notice of the fraud, so long as he could have ascertained the true condition of the books with ordinary diligence, he cannot now be allowed to set up fraud. It is well settled that where there are misrepresentations, and the truth can be ascertained with ordinary diligence, no action lies. (*Long v. Warren*, 68 N. Y. 426; *Tallman v. Green*, 3 Sand. 437; *Smith v. Countryman*, 30 N. Y. 681; *Slaughter's Adm'r v. Gerson*, 13 Wall. 383; 2 *Parsons on Contracts*, 773, and note; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 292; *Fulton v. Hood*, 34 Pa. St. 365; 75 Am. Dec. 664; *Gatling v. Newell*, 9 Ind. 572; *Bigelow on Fraud*, 66; *Mayhew v. Phoenix Ins. Co.* 23 Mich. 105; *Foley v. Cowgill*, 5 Blatchf. 18; 32 Am. Dec. 49; *Salem India Rubber Co. v. Adams*, 23 Pick. 256.) The element which is lacking in this case to make the misrepresentations actionable, if they were misrepresentations, is that they were not relied on nor acted upon by plaintiff. The agreement between the partners, in relation to the excess contributed by Pierce, was that in case of a dissolution and accounting, Pierce's excess should be deducted before a division of the resources, but that there was no dissolution and accounting as anticipated by the agreement, but merely the purchase of defendant's interest, whatever it was, and plaintiff in fact received the whole of his excess. The plaintiff was not entitled to recover the seventy-five dollars defendant agreed to allow during his absence in the East, because this account was canceled and extinguished in the agreement of dissolution and purchase. (*Murdock v. Mehlhop*, 26 Iowa, 213; *Norman v. Hudleston*, 64 Ill. 11.)

Massena Bullard, for Respondent.

It is alleged by the plaintiff, and not denied by the defendant, that under the partnership agreement it was the duty of the defendant to keep the books of accounts of said firm. The items complained of by the plaintiff did not appear in the books; the Hubble items were not credited to the plaintiff's account. The excess in the investment was not credited to the plaintiff's account, and the amount agreed upon during the absence of the defendant did not appear. It is alleged by the plaintiff, and established by the proof, that if the plaintiff had been informed of the true condition of the partnership, he would never have made his purchase, and he would never have paid the defendant anything for his interest in the partnership. We take it to be a self-evident proposition that in a case like this, when one partner is in charge of the books, and the other, as shown by the testimony, has nothing to do with reference to keeping the books, nor has any knowledge of book-keeping, but relies upon his partner in that behalf, it is the duty of the man who keeps the books to keep them accurately, and when he turns them over to his partner that is of itself a sufficient representation as to the correctness, and particularly as to the honesty of the entries in the books; and the partner to whom such representation is made has the right to rely upon that representation. (2 Lindley on Partnership, 486; *Smith v. Smith*, 30 Vt. 139.) "If the fraud be such that had it not been practiced, the contract would not have been made or the transaction completed, then it is material to it; but if it could be shown or made probable that the same thing would have been done by the parties in the same way, if the fraud had not been practiced, it cannot be deemed material." (2 Parsons on Contracts, 770.)

BLAKE, C. J.—Pierce brought this action to recover certain amounts which he alleged had been collected by Ten Eyck when they were copartners, and not entered upon the books of the firm, or accounted for. A referee was appointed to take the testimony, and his findings were adopted by the court. It appears that the copartnership continued from the fifteenth day of September, 1882, until the eighteenth day of March, 1886, when Pierce

“purchased the said defendant’s interest in said partnership and in the property, and resources and assets belonging thereto, paying the said defendant for his said interest the sum of \$4,000.” The judgment consists of three items, which will be considered in their order, in the report of the referee.

One Hubble was indebted to Pierce, personally, before the formation of the copartnership, in the sum of \$422.50, which was received by Ten Eyck in the year 1883, and not placed to the credit of Pierce upon the books. The entries regarding this amount indicate clearly that it was not appropriated by the appellant to his individual use, but became a part of the assets of the firm. The account of Hubble shows that there has been placed to his credit the sum of \$300, which is followed by the remark: “Debtor to Pierce.” Hubble was in the employ of the firm, and one Locker, through a cattle trade with the parties, paid a debt to Hubble, who had another credit in the sum of \$122.50. While the books are not accurate in these matters, they do not establish the right of Pierce to the whole amount. This sum of \$422.50 did not lawfully constitute any part of the property of the firm, and the purchase by Pierce of the interest of Ten Eyck did not embrace or settle the account. But Ten Eyck, as a copartner, actually had the benefit of one half of the amount, which had been credited to Hubble; and the respondent should have a judgment therefor.

Pierce contributed to the firm the sum of \$387.52 in excess of his share; and it was agreed that upon the dissolution of the copartnership this amount should be first deducted from the assets, and that the remainder should be divided equally between the parties. This is the second item of the account for which the respondent recovered judgment. There was no contract in writing which defines the rights of the copartners, and the evils which generally ensue under these conditions attend the parties. The sale by Ten Eyck to Pierce of his entire interest in the property of the firm worked a dissolution. (*Rogers v. Nichols*, 20 Tex. 719.) But we are of the opinion that the agreement did not contemplate a termination of the partnership in this way, and that Pierce, by his new bargain with Ten Eyck, which was a purchase without any reservation of demands, relinquished all claims of this class.

The respondent testified before the referee that he feared there was something wrong; that he did not believe the books were properly kept; and that he had discovered some mistakes. The errors of which he chiefly complains are the omissions of Ten Eyck, who was the book-keeper, to make entries pertaining to the business. Pierce could have investigated thoroughly the books, with the aid of experts, if necessary, and ascertained every fact therein concerning the affairs of the firm. Instead of pursuing the course which was dictated by wisdom, when his mind was swayed by suspicion of the conduct of Ten Eyck, he purchased voluntarily the interest of his partner. The referee finds "that the books were in a condition to mislead the plaintiff, and that, by reason of defendant's failure to give to plaintiff his proper credits, plaintiff was misled, and plaintiff did pay a greater sum for defendant's interest than he would have paid if he had known the true condition of the books." This comprises a fair statement of the excuse which has been pleaded by the respondent to justify his negligence in the exercise of ordinary diligence. We confess that we cannot perceive any grounds on which Pierce is entitled to recover the amount of this excess from Ten Eyck. Mr. Justice Field, in *Slaughter's Adm'r v. Gerson*, 13 Wall. 383, lays down the law in one sentence: "A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness."

Judgment was entered against the appellant for the sum of \$75, through the following finding of the referee: "That it was agreed between plaintiff and defendant that during an absence of defendant, while out of the Territory for three months, between December, 1883, and April, 1884, the firm should be credited with \$50 per month to compensate for defendant's loss of time; that no such credit was ever given." This demand is governed by the views which have been expressed in respect to the preceding item. When Ten Eyck was absent, it was the duty of the person in charge of the book, under the direct command of Pierce, to put in black and white the figures referring to this agreement. We cannot understand why the appellant is to be held responsible for this omission, or why the respondent did not look after the business in which he was an equal partner. The claim must meet the fate of its predecessor.

It is therefore adjudged that the judgment be reversed, with costs, and that the cause be remanded, with directions to the court below to enter a judgment for the plaintiff for the sum of \$211.25, and interest thereon from the twenty-third day of February, A. D. 1888.

HARWOOD, J., and DE WITT, J., concur.

9	854
15	449
23*	729
30*	459

CHADWICK ET AL., RESPONDENTS, v. TATEM ET AL.,
APPELLANTS.

WILLS — Testamentary disposition — Revocation. — In the case at bar the testator devised to his wife all of the personal estate and one half of all mining property. After the making of the will he executed with his wife a deed in escrow of certain mining property, with a contract for its delivery upon the payment of the specified purchase price. After the death of the testator, and before the expiration of the contract, the grantee of the deed made the necessary payment and received the deed. *Held*, that under sections 461 and 463 of the Probate Practice Act, providing in substance that an agreement by a testator for the sale of property disposed of by will previously made does not revoke such disposal, but the property passes by the will, subject to specific performance against the devisees, and that a conveyance or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, the execution of the deed and contract did not amount to a divestiture of the title of the testator, but that the title passed to the devisees, subject to the conditions so placed upon it, and the divestiture was consummated upon the performance of the condition and the second delivery.

DOWER — Statutes — Repeals, express and implied. — No portion of "an act concerning dower," enacted by the ninth legislative assembly of 1876, is embraced in any section of the Revised Statutes of 1879, and is therefore not expressly repealed by section B, chapter lxx. of the Revised Statutes, providing that "all acts of the legislative assembly passed prior to the twenty-first day of February, 1879, or on said day, any portion of which is embraced in any section of said codification, are hereby repealed," and "that all acts of the legislative assembly passed prior to or on said last-named day, no part of which are embraced in said codification, shall not be affected or changed by its enactment," but is in full force, and has not been repealed by implication by reason of its omission from the Revised Statutes of 1879 and the Compiled Statutes of 1887.

SAME — Election. — Where the widow has taken lands devised to her under the provisions of the will, she is barred from claiming dower by sections 6 and 7 of said act concerning dower, which provide in substance, that every devise of lands shall be in lieu of dower, unless within one year after the probate of the will she elect to renounce such devise and take her dower therein.

COMMUNITY PROPERTY. — A widow who has taken by virtue of the will more than one half of the whole estate cannot claim any part of the other half on the ground that the whole estate was community property, under section 551 of the Probate Practice Act, providing that upon the death of the husband one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband.

Appeal from First Judicial District, Lewis and Clarke County.

Judgment on the pleadings in favor of the plaintiffs was rendered by McCONNELL, C. J.

J. C. Robinson, and Massena Bullard, for Appellants.

The property in question at the time of the death of the testator was not a part of his real property, but was personalty, and the widow was, under the will, entitled to the whole of it. We claim this on the principle of law that the estate was by the said deed taken out of the operation of the will as to the realty, and that the deed operated as a revocation of the will to the extent of the property included in the deed. The rule is well settled that deeds of this kind—escrows—ordinarily take effect at the time of the second delivery, that is, when the condition is performed upon which they are to be delivered; but in case of the death of the grantor, and in other cases, after the first delivery, as it is called, and before the second, the title passes at the time of the first—relates back to that time and is effectual from the first delivery. (3 Washburn on Real Property, 273; *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Shirley v. Ayers*, 14 Ohio, 307; 45 Am. Dec. 546; *Foster v. Mansfield*, 3 Met. 412; 37 Am. Dec. 154, and note; *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Jones v. Jones*, 6 Conn. 11; 16 Am. Dec. 35, and note; *Gilmore v. Whitesides*, Dud. Eq. 14; 31 Am. Dec. 567; *Jackson v. Rowland*, 6 Wend. 666; 22 Am. Dec. 559; *State Bank v. Evans*, 3 Green, 155; 28 Am. Dec. 400, and note; *Hathaway v. Payne*, 34 N. Y. 106; *Brown v. Austin*, 35 Barb. 360; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 241; *Calhoun Co. v. American Emigrant Co.* 93 U. S. 127; 3 Redfield on Wills, 305.) Section 461 of the Probate Practice Act relative to wills refers to contracts to convey, and has no application to the case at bar whatever. Nowhere in any law or theory of contracts to convey can a question of this kind arise; such a case is not to be found in all the text-books of reports. In this case there was nothing for the grantor to do; the deed was fully executed so far as it lay in the power of the grantor to execute it, and was subject

to become inoperative only by the failure of the grantee to perform his part, and the grantor was bound to wait the action of the grantee named in the deed, and as soon as he acted—performed his condition—the deed took effect at the date of its first delivery. It was in no sense a contract to convey. Under section 463 of the same act we claim that if there was any effect produced as the property by the deed at all, it wholly divested it, and it cannot be claimed that the escrow did not have any effect on the status of the property. In the absence of these sections of our statute there would be no question as to the effect of the escrow on the property devised—that the will would be revoked *pro tanto*, and the devisees would not take it. We hold that the title to the property was wholly divested, and, if so, the judgment of the District Court was wrong. (1 Williams on Executors, 241, et seq.; *Moore v. Burrows*, 34 Barb. 173; *Adams v. Green*, 34 Barb. 176; *Schroepel v. Hopper*, 40 Barb. 425; *McNaughton v. McNaughton*, 41 Barb. 50; *Brush v. Brush*, 11 Ohio, 287; *Beck v. McGillis*, 9 Barb. 35–49; *Adams v. Winne*, 7 Paige, 97; *Pond v. Bergh*, 10 Paige, 148; *Vandemark v. Vandemark*, 26 Barb. 416–418; *Brown v. Brown*, 16 Barb. 569; 2 Am. Lead. Cas. Hare & W., [5th ed.], 530–537, et seq.; *Coulson v. Holmes*, 5 Sawy. 279; 1 Jarman on Wills [5th ed.], 162; 1 Redfield on Wills, pp. 340, 341, and notes.) Section 464 of the statute as to wills has no application to this case, in that the deed—escrow—was wholly inconsistent with the testamentary disposition of the property by the will, and was a revocation thereof as to this property. There was such an alteration in the condition of the estate so inconsistent with the provisions of the will as to be a revocation. As to the question presented for the election of the widow, we hold that the ruling of the court was wrong on that. The doctrine of election cannot be invoked in this case. (§ 1, Leading Cases in the American Law of Real Property, 359, and cases cited.) In the absence of a statute providing otherwise, the intent must be clear. (*Clark v. Griffith*, 4 Iowa, 405; *Higginbotham v. Cornwell*, 8 Gratt. 83; 56 Am. Dec. 130; *Smith v. Kniskern*, 4 Johns. Ch. 9; *Sanford v. Jackson*, 10 Paige, 266; *Douglas v. Feay*, 1 W. Va. 26; *Kelly v. Stinson*, 8 Blackf. 387; *Alling v. Chatfield*, 42 Conn. 276;

Gordon v. Stevens, 2 Hill Ch. 46; 27 Am. Dec. 445.) The duty to elect must be expressed in the will. (*Perry v. Perryman*, 19 Mo. 469; *Bryant v. McCune*, 49 Mo. 546; *Booth v. Stebbins*, 47 Miss. 161; *Blunt v. Gee*, 5 Call, 481.) If the provisions in the will are inconsistent with dower, then an election may be compelled. (*McCullough v. Allen*, 3 Yates, 10; *Kennedy v. Nedrow*, 1 Dall. 415.) The provisions in the will are not to be held in lieu of dower unless the bequest is so repugnant to the claim of dower that the two cannot stand together. (*Tobias v. Ketchum*, 32 N. Y. 319; *Lewis v. Smith*, 9 N. Y. 502; 51 Am. Rep. 706; *Bull v. Church*, 5 Hill, 206; *Jackson v. Churchill*, 7 Cowen, 287; 17 Am. Dec. 514; *Savage v. Burnham*, 17 N. Y. 562; *Lasher v. Lasher*, 13 Barb. 106; *Tooke v. Hardeman*, 7 Ga. 20; *Fuller v. Yates*, 8 Paige, 325; *Adsit v. Adsit*, 2 Johns. Ch. 448; 7 Am. Dec. 539; *Sample v. Sample*, 2 Yates, 433, 489; *Havens v. Havens*, 1 Sand. Ch. 324; *Sanford v. Jackson*, 10 Paige, 266; *Corriell v. Ham*, 2 Iowa, 552; *Stewart v. Stewart*, 31 N. J. Eq. 398; *Cain v. Cain*, 23 Iowa, 31; 2 Redfield on Wills, 352, 353, 354, 355, et seq., and notes 11 and 16.) There is no election under a will when its provisions and dower can take effect together. (*Herbert v. Wren*, 7 Cranch, 370; *Baxter v. Bowyer*, 19 Ohio St. 490.) The facts in this case do not constitute an election. (*Price v. Woodward*, 43 Mo. 247; *Anderson's Appeal*, 36 Pa. St. 476; *Bradforde v. Kents*, 43 Pa. St. 474; *Millikin v. Welliver*, 37 Ohio St. 460.) The Probate Practice Act of Montana provides that "upon the death of the husband, one half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband. (§ 551, second div. Comp. Stats. Mont.) The statutes having referred to community property, and provided for its distribution, it is the duty of the court to give effect to the provision—to give some meaning to the words that are employed, if it can be done. While our statute does not expressly determine what shall be community property, it mentions and disposes of it. When we go to the statutes where community property is defined, we find that it includes the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the proceeds of the reciprocal industry and labor of both hus-

band and wife, and estates which they may acquire during the marriage, either by donations made jointly with them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both. (3 Am. & Eng. Encycl. of Law, 350; *Cooke v. Bremond*, 27 Tex. 457; 86 Am. Dec. 626, and authorities there cited.)

Hedges & Miller, and Carpenter, Buck & Hunt, for Respondents.

The money paid for mining property described in the deed should pass to the beneficiaries named in the will, who would have been entitled to the said property if the money had not been paid. There was an agreement between testator and Broadwater that a sale should be made if Broadwater elected to buy. The deed was deposited in escrow as a convenient method for carrying the agreement into effect. Until Broadwater indicated his election to purchase, by depositing the money, title, and seisin, every right to the property, excepting only Broadwater's right to prospect for a limited time, remained in the testator and his devisees. A deed, however, will not be permitted to take effect by relation to the injury of rights of third parties; surely not when the rights given by a will are confirmed by statute. (*Jackson v. Bard*, 4 Johns. 234; 4 Am. Dec. 267; *Jackson v. Bull*, 1 Johns. Cas. 90; *Hathaway v. Payne*, 34 N. Y. 92; *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Shirley v. Ayers*, 14 Ohio, 307; 45 Am. Dec. 546.) Prior to 1830 it was the universal rule that if after the devise of real estate the testator contracted to sell the same, such contract wrought a revocation of the devise, and a conversion of the real into personal property, for the purpose of distribution. In 1830 the harshness of this rule was obviated in New York by an enactment (2 N. Y. Rev. Stats. p. 64, § 45) similar in substance to the provisions of section 461 of the Probate Practice Act of Montana. This statute changed in New York the rule as to the equitable conversion of the subject of the devise by a covenant or agreement to sell the same. (*Adams v. Winne*, 7 Paige, 101; *Vandemark v. Vandemark*, 26 Barb. 416; *Langdon v. Astor*, 16 N. Y. 9; *Beck v. McGillis*, 9 Barb. 53; 4 Kent [marg. p.], 532, 533; *Knight v. Weatherwax*, 7 Paige,

184.) Sections 462, 463, and 464, at page 384 of the Compiled Statutes of Montana, are the same as sections 46, 47, and 48 of 2 Revised Statutes of New York, page 64, and these sections dispose of the whole doctrine of implied revocation. (*Delafield v. Parish*, 25 N. Y. 9, 99; 2 Redfield's Surrogate Reports, 460.) The decision in *Knight v. Weatherman* was made after a full consideration of section 48 of the New York Revised Statutes, which is substantially the same as said section 464, Compiled Statutes of Montana. The statute was adopted in Montana with the meaning which had been given to it in New York. The contract to sell the mining property is not inconsistent with the terms and nature of the testamentary disposition thereof. The only case where the alteration of a testator's interest in real property has been held to be a revocation of a previous devise, is where the testator actually conveyed the property during his lifetime, and took back a bond and mortgage in payment therefor. This was deemed to be a complete change and divestment during the lifetime of the testator, and inconsistent with the terms of the devise. (*Brown v. Brown*, 16 Barb. 572; *Adams v. Winne*, 7 Paige, 97; *Beck v. McGillis*, 9 Barb. 55.) To produce a full revocation his property must be wholly divested. (*Matter of Dowd*, 58 How. Pr. 109.)

The widow, Norma D. Chadwick, has no dower interest in the testator's estate. The "act concerning dower," passed in Montana in 1876, was in force at the time of the testator's death. (See Laws of 1876, p. 63.) It has never been expressly repealed. It has not been repealed by implication so far as the statutes of Montana have any effect: (1) Because no act inconsistent with, or repugnant to it, has been subsequently passed. (2) Because no part of said act is embraced or contained in a subsequent codification or compilation of the Montana statutes. (See Repeal Provisions of Rev. Stats. 1879, p. 671; Repeal Provisions of Comp. Stats. 1887, p. 1235.) These repeal provisions are a copy of the United States repeal provisions (see U. S. Rev. Stats. § 5596), and have been construed in the following cases, to wit: *United States v. Bowen*, 100 U. S. 513; *Arthur v. Dodge*, 101 U. S. 36; *Cambria Iron Co. v. Ashburn*, 118 U. S. 57. By section 7 of said act the widow takes the devise in lieu of dower, unless within a year she files in the Probate Court a

written renunciation of the devise. She now claims the devise, and has never renounced it, and therefore the defendant, Norma D. Chadwick, has no right to dower. There is no such thing as "community property" under the laws of Montana. Community property is defined neither by the common law nor by any Montana statute, and is simply referred to in sections 120, 140, 549, 550, and 551 of the Probate Practice Act. The sections of the Montana statutes in which the words "community property" occur are somewhat similar to certain sections concerning community property in the California statutes, and through carelessness crept into our statutes when parts of the California "act defining the rights of husband and wife" and parts of the Probate Act of California were brought to Montana. The Montana legislature having failed to declare what "community property" is, or to provide for its creation or existence, the court may not supply omissions in the statutes. (Endlich on Statutes, §§ 19, 22; *Holmes v. Service*, 80 Eng. Com. Law Rep. 293; *Chaffee's Appeal*, 56 Mich. 244.) Nor may a conjectural meaning be given by the court. (*Commonw. v. Bank of Pennsylvania*, 3 Watts & S. 173, 177; *State v. Partlow*, 91 N. C. 550; 49 Am. Rep. 652; *Ward v. Ward*, 37 Tex. 389; *McConvill v. Mayor etc. Jersey City*, 39 N. J. L. 38; Endlich on Statutes, § 24.)

HARWOOD, J.—In this action there is no controversy as to the facts. The questions involved which demand our consideration relate to the construction of a will, and the proper distribution to the devisees thereunder, according to the terms of the will and the law governing. In September, 1885, Walter F. Chadwick died in the city of Helena, in Montana Territory, where he had long been a resident. The deceased left a last will and testament, bearing date April 6, 1882, whereby he appointed the appellants, Benjamin H. Tatem, John C. Curtin, and William C. Bailey, executors thereof. This will was duly admitted to probate, and the executors entered upon the duties of its execution. By the terms of his will the testator devised to his wife, Norma D. Chadwick, all of the personal estate of testator after paying his debts, and an undivided two thirds of all real estate of which the testator died seised, excepting there-

from "all mining property, either quartz leads or lodes, or placer ground, or fire-clay lands, with water rights and mill sites." Of the said mining property, quartz leads or lodes, placer ground, fire-clay lands, together with water rights and mill sites, the testator devised to his said wife one undivided half, and the other half thereof he devised to the respondents, to be distributed to them in share and share alike. After the execution of said will, and on the twentieth day of January, A. D. 1885, the testator, and his wife, Norma D., joining with him, made and executed a deed of conveyance of certain mining property described therein, then, and at the time of making said will, owned by the testator, to one Charles A. Broadwater, grantee. The consideration named in said deed was \$37,500. At the time of executing said deed a certain contract or memoranda referring to the same was made and signed and acknowledged by said Walter F. Chadwick and his wife, Norma D., and said Charles A. Broadwater, which provides as follows: "The enclosed deed of the following described property, viz. [here follows a description of the property set forth in the deed]; also a contract for the conveyance of the Sixty-ninth lode, and another contract for the conveyance of the Little Sampson lode—all of said property being more particularly described in said deed—is hereby placed in escrow in the Montana National Bank. If Charles A. Broadwater shall place to the credit of Walter F. Chadwick, to the credit of his heirs, administrators, or assigns, the full sum of \$33,750 on or before the first day of September, A. D. 1885, then and in that case the Montana National Bank is authorized to deliver the enclosed deed to Charles A. Broadwater or his order. In case the said Charles A. Broadwater shall not place, or cause to be placed, to the credit of said Walter F. Chadwick, his heirs, administrators, or assigns, the sum of \$33,750 in said Montana National Bank on or before the first day of September, A. D. 1885, the bank is hereby authorized to deliver the said deed to Walter F. Chadwick or his order, his heirs or assigns. It is further agreed that no ore excavated by said Broadwater on or from said premises between the date hereof and the said first day of September, or until the payment of the sum above specified, shall be removed from the dump of said property; and that, in case of failure to

pay said sum at the time specified, the same, and all moneys paid by the said Broadwater to said Chadwick, shall become forfeited, and said Chadwick may retain the same as liquidated damages; and said second party shall not create any liens on said property. It is further agreed that said Chadwick will clear the said premises of and from any and all encumbrance, if any there be, now existing and of record, done, caused, or suffered by him."

Another contract was made at the same time, and in reference to the same transaction, signed by the testator, Walter F. Chadwick, and said Charles A. Broadwater, which provides as follows: "That said parties of the first part [Chadwick and wife], for and in consideration of the sum of \$33,750 to them in hand paid by the second party, the receipt whereof is hereby acknowledged, and for certain other considerations mentioned and expressed in an escrow agreement deposited with a certain deed of conveyance in the Montana National Bank of Helena, of the following described property, situate in Ten-Mile unorganized mining district, in the county and Territory aforesaid, viz. [here follows a description of the property described in the deed]; all of which property and premises are particularly described in said deed, which bears even date herewith, the same having been as aforesaid executed by said first parties to said Broadwater, and which said deed is to become effective on the compliance with the conditions expressed in said escrow agreement by said second party. Now, therefore, the said first parties hereby agree to and with said second party that, upon compliance with and the fulfillment of the conditions named and expressed in said escrow agreement to be done and performed by said second party, the said deed so deposited shall be delivered to said second party, and the title to said property and the premises therein described shall be and become absolute in said second party, his heirs, etc., according to the covenants and provisions in said deed contained."

The said deed and contracts were placed by the parties thereto in the custody of the said Montana National Bank, to be disposed of according to the conditions set forth in said contracts. The transaction and the papers remained in this condition until near the time for the fulfillment or forfeiture on the part of Broadwater, when, on the 18th of August, 1885, said Walter F.

Chadwick and Broadwater entered into a third agreement in writing respecting the transaction. The effect of this third agreement was to reduce the sum to be paid on the final taking up of said deed by Broadwater from the sum of \$33,750 to the sum of \$22,500, and to extend the time within which Broadwater might pay said last-mentioned sum from the first day of September, 1885, to the first day of January, 1886. While the transaction remained in this state, and on the twenty-eighth day of September, 1885, the said Walter F. Chadwick died, leaving his last will and testament, with the provisions aforesaid; and thereafter, on the thirty-first day of December, A. D. 1885, the said Broadwater deposited in the said Montana National Bank, and paid to said executors the said sum of \$22,500, in fulfillment of the conditions of said transaction on his part; and thereupon said bank delivered to said Broadwater said deed. Now a contention has arisen between the executors and Norma D. Chadwick, the appellants, on the one side, and the other devisees, respondents, on the other, as to the proper distribution of said sum of money arising from said sale of mining property, under said will. The appellants claim that this entire fund should go to the widow, Norma D., under the provisions of the will giving her the personal property; while the respondents contend that this fund should be distributed as provided under the will for the division and distribution of said mining property, of which they claim the testator died the owner; that is, one half thereof to the widow, Norma D., and the other half thereof to the other devisees in equal shares.

In the absence of statutory provisions the solution of this question would be attended with much difficulty. There are, however, statutory provisions which have a bearing upon this contention, and these provisions command the first consideration by the court. The statute of this State in reference to the execution and revocation of wills, at sections 461 and 463, Probate Practice Act, provides as follows: "Sec. 461. An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal, but the property passes by the will, subject to the same remedies on the testator's agreement for a specific performance, or otherwise, against the devisees or legatees, as might be had against the tes-

tator's successors, if the same had passed by succession." "Sec. 463. A conveyance, settlement, or other act of a testator by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, but the will passes the property which would otherwise devolve by succession." If the transaction between the testator and Broadwater only amounted to an agreement for the sale or transfer of the said mining property, then the position taken by appellants cannot be sustained. Again, if the transaction in question amounted, in the language of the statute, to "a conveyance, settlement, or other act of the testator, by which his interest in the thing previously disposed of by his will is altered, but not wholly divested," the position taken cannot be sustained.

The question is, did the transaction amount to a complete divestiture of the title by the testator? We think not. Where was the title to this property while Broadwater had the option to purchase? Can it be said it was vested in Broadwater? The deed lay as a dormant instrument in the custody of the bank, without efficacy as a conveyance, until a certain condition was performed by Broadwater, and a delivery of the deed was made to him by the bank. The conditions were such that, if Broadwater did nothing, the title remained in the testator, and passed by his will to the devisees; but, if he performed the conditions, that is, paid the sum of \$22,500 within a certain time, and obtained from the bank a delivery of the deed, then the title thereby passed to him. It is frequently asserted by the decisions of courts, and by eminent authorities, going back as far as Lord Coke, that the general rule is that an instrument delivered in escrow takes effect only on the performance of the conditions and the second delivery, and is not operative until the conditions are performed and the second delivery is made. This doctrine is decisive of the question under consideration. If the deed is inoperative until the performance of the conditions, it follows that the estate is "not wholly divested," and passes by the terms of the will.

In answer to this line of reasoning, counsel for appellants invoke the aid of authorities where it is held that to prevent injustice, or to prevent the defeat of the plain intention of the parties, courts of equity will allow the second delivery of the

escrow to take effect by relation from the time of the first delivery. Let this be granted, and does not the proposition carry with it the conclusion that the act which consummates the divestiture is the performance of the condition and the second delivery? And this second delivery may be given so great a force as to be allowed to relate back in its effect to the first. But this doctrine of relation, which in some of the decisions is called a "fiction," is the exception to the rule applying to escrow instruments, and not the general rule.

It is contended, also, by appellants, that if the title remained in the testator until the conditions were performed and the second delivery was made, the testator having died some months before the second delivery, the effect is that the title remained in the deceased until the condition was performed, and then passed from him to Broadwater, which is not consonant with reason, or with the rules of law; that if the testator died seised of said mining property, September 28, 1885, and the title did not pass to Broadwater until the second delivery, December 31, 1885, the title passed from the deceased on the latter date, which could not be, as the title could not remain in the deceased during the period from September 28 to December 31, 1885, and then pass from him to Broadwater. Hence the title had to pass, if at all, from the first delivery. This position will not stand the test of legal rules and reason. When the testator died, his will became operative, and by virtue of the will and the law the title passed to the devisees, subject to such conditions as the testator had placed upon it in his transaction with Broadwater. (Comp. Stats. [Prob. Prac. Act] §§ 461, 463.) The testator had not only made a will touching the property in question, but he had placed other conditions upon it, by virtue of which it might or might not pass away from him or his devisees. The law joins these two provisions together, and provides that both shall have effect upon the property. The will passes the property to the devisees, subject to the conditions. The conditions being fulfilled, the act of the testator carries the title away from the devisees to another. This conforms to the statute quoted *supra*. These provisions were evidently enacted to change a rule of long standing, by which, if real property be devised, and after the execution of the will, the testator makes a contract to sell the

same; this was construed as a revocation of the will as to such property, and the further rule that such a transaction wrought a conversion of such property from real to personal estate. We are of opinion that the case at bar is controlled by the statute. Chancellor Walworth, in the case of *Knight v. Weatherwax*, 7 Paige, 182, places this construction upon a similar statute existing in New York. He had to view the same question here under consideration, and he says: "Whether the two lots were to be considered as real or personal estate after the making of the agreement to sell the same, the interest of the testatrix therein passes to the objects of her bounty, as specified in the first clause of her will, in the same manner as if that agreement had not been made; subject to the complainant's right to a specific performance of the contract, upon payment of the purchase money and interest, according to the terms of his agreement."

We will now consider the two remaining questions brought up for our determination by this appeal. *First.* The appellants claim that said "Norma D. Chadwick is entitled, in addition to the legacies and bequests in her behalf contained in said will, to a dower interest of, in, and to all lands and real property of which the said Walter F. Chadwick died seised, which dower interest should first be carved out of said real estate, prior to the distribution thereof to the devisees in said will." *Second.* That all property mentioned in the said will was at the death of the testator "community property," and by reason thereof said wife, Norma D., was entitled to one half of all of said property, in addition to the property devised to her by said will. Here are two claims put forth, predicated upon the proposition that, under the law as it then existed, the widow is entitled to dower, and in addition thereto is entitled to one half of what is termed "community property."

Proceeding in the order stated, first as to dower. In 1876 (Laws 9th Sess. p. 63) the legislative assembly of Montana passed an "act concerning dower," which provided what interest in the lands of the husband the wife should be endowed of; when dower should attach; the manner by which it could be claimed and enforced, or relinquished, or superseded by other benefits; and, in general, the act covered and controlled the subject of dower. While it is not directly disputed that this act

has continued in force since its adoption, still this point is brought to the attention of the court, and should be determined. It does not appear that said act concerning dower has ever been expressly repealed; but the question arises as to whether it has been repealed by implication; and this arises from the fact that two general compilations of the statutes of Montana have been made since the passage of said act, in neither of which has it appeared. The first compilation of 1879, known as the "Revised Statutes of Montana," does not incorporate said "act concerning dower." We must now examine and determine whether the repealing clause embodied in section B, chapter lxx. of the Revised Statutes, repealed the "Dower Act." Section B is as follows: "All acts of the legislative assembly passed prior to said twenty-first day of February, 1879, or on said day, any portion of which is embraced in any section of said codification, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such codification having been repealed or superseded by subsequent acts, or not being general and permanent in their nature; *provided*, that the incorporation into said codification of any general and permanent provision taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect, any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of the legislative assembly passed prior to or on said last-named day, no part of which are embraced in said codification, shall not be affected or changed by its enactment." Proceeding to the Compiled Statutes of 1887, we find the repealing section (2072, ch. cxxiv.) is *verbatim* with that of the Revised Statutes of 1879, except the change in date. It is unnecessary, however, to consider the latter compilation, except by way of illustration of this subject, for two reasons: *First*. All the facts involved in this consideration arose prior to 1887. *Secondly*. In 1887 Congress passed an act providing for dower to the widow in this and other Territories; thereby placing the question beyond repeal by our legislative assembly while we remained in a territorial condition. Act of Congress entitled "An act to amend an act entitled 'An act to amend section 5352

of the Revised Statutes of the United States, in reference to bigamy, and for other purposes;’ approved March 22, 1882.” (24 Stats. at Large, 635.)

The question, then, is, did the repealing clause in the Revised Statutes of Montana of 1879 repeal the “act concerning dower,” approved February 11, 1876, *supra*? The terms of such repealing clause, when carefully considered, are very clear, and show exactly what was intended to be repealed. “All acts of the legislative assembly passed prior to the twenty-first day of February, 1879, or on said day, any portion of which is embraced in any section of said codification, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof.” So far, the repealing clause has not touched the “act concerning dower.” The subsequent portion of that clause, down to the proviso, is explanatory of what went before, in these words: “All parts of such acts not contained in such codification having been repealed or superseded by subsequent acts, or not being general and permanent in their nature.” A proviso is here inserted in the section, which does not affect said “act concerning dower”; and the section closes as follows: “And all acts of the legislative assembly passed prior to or on said last-named day, no part of which are embraced in said codification, shall not be affected or changed by its enactment.” It is clear that no part of the “act concerning dower” is embraced in said codification; and therefore we think it follows, without doubt, that said act is not repealed, but has stood in full force, although from some cause it was not incorporated in said codification. We have nothing upon which to base even an inference that it was the intention of the legislature to repeal this “act concerning dower.” It was the law in full force when said codification was made, and the subject of dower is entirely wanting in the compilation of 1879. Repeals by implication are not favored by the law, and the strong leaning of the courts is against the doctrine. (Potter’s Dwaris on Statutes, 154–160, and cases there cited.)

Sections 6 and 7 of said “act concerning dower” are decisive against the position that said Norma D. is entitled to dower in addition to the devise and bequests under the will. Said sections provide as follows: “Sec. 6. Every devise of land, or

any estate therein, by will, shall bar her dower in lands, or of her share in personal estate, unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands, and her share in the personal estate. Sec. 7. When a woman shall be entitled to an election under this act, she shall be deemed to have taken such devise, unless within one year after the authentication or probate of the will she shall deliver or transmit to the court of probate of the proper county a written renunciation, which may be in the following form, to wit: 'I, A. B., widow of C. D., late of the county of ———, Territory of Montana, do hereby renounce and quit all claims to the benefit of any bequest or devise made to me by the late will and testament of my said deceased husband, which has been exhibited and proved according to law (or otherwise, as the case may be); and I do elect to take, in lieu thereof, my dower or legal share of the estate of my said husband;' which said letter of renunciation shall be filed in the office of the probate judge, and shall operate as a complete bar against any claim which such widow may afterwards set up to any provision which may have been thus made for her in the will of any testator, in lieu of dower; and by thus renouncing all claims, as aforesaid, such widow shall thereupon be entitled to dower in the lands, or share in the personal estate, of her husband." It appearing by the record that the widow, Norma D., has not renounced her rights under the will, but, on the contrary, has taken thereunder, she is barred from now claiming dower.

Upon the question of "community property," we find no difficulty in determining the rights of the appellant, Norma D. Chadwick, under the facts presented in this case. The provision relied upon by the appellants is found in section 551, Probate Practice Act, as follows: "Upon the death of the husband one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and, in the absence of such disposition, goes to his descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation." It is claimed by appellants that the whole

estate which the testator devised and bequeathed was "community property." While we do not here decide or imply that the appellants' position as to what is "community property" is correct, it would appear that, if appellants' position is conceded for the purpose of this discussion, it would not change the rights of the widow, Norma D., as she has, by virtue of the will, more than one half of the whole estate. We nowhere find provisions that would entitle the widow to one half by virtue of the statute and any part of the other half, which is otherwise disposed of by will. The statute implies the contrary by declaring that the "other half is subject to the testamentary disposition of the husband," *supra*. We are clearly of the opinion that the few, vague, and indefinite allusions of the Probate Practice Act in reference to community property do not apply to the case at bar in such a way as to change the rights of the devisees under the will in question. We therefore do not feel called upon, in this action, to trace the question further, to determine what application these few statutory references to community property might have to other cases. This species of property right, called "community property," is certainly not indigenous to this jurisdiction; and, as an exotic, it has not been transplanted with sufficient root to develop a form having definite attributes or symmetrical proportions. The judgment of the court below is affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

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STATE OF MONTANA EX REL. LOUIS ROTWITT,
RELATOR, v. RICHARD O. HICKMAN, RESPONDENT.

CONSTITUTIONAL LAW — Compensation of State officers — Appropriations by constitutional provision. — Section 4, article vii. of the Constitution, provides that until otherwise provided by law, certain State officers enumerated, "shall quarterly, as due, during their continuance in office, receive for their services compensation, which is fixed as follows: Secretary of State, three thousand dollars per annum. . . . The compensation enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office, and the salary of no official shall be increased during his term of office. No officer named in this section shall receive, for the performance of any official duty, any fee for his own use."

... ." Section 51, article v., provides that: "Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election. . . ." Section 34, article v., provides that: "No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt." Section 1, article vii., provides that the State auditor and State treasurer "shall perform such duties as are prescribed in this constitution, and by the laws of the State." The State treasurer refused to pay a warrant drawn on him by the State auditor in favor of the relator for his quarterly salary as secretary of State, upon the ground that no appropriation had been made by law for the payment of any warrant issued to State officers for their services. *Held*, that the State treasurer was required to pay such warrant, as the provision of the constitution that certain enumerated officers shall receive the compensations specified therein is an appropriation made by law, and no legislative act is necessary.

Original proceeding. Application for writ of *mandamus*.

McCutcheon & McIntyre, for Relator.

Relator seeks a mandate requiring the State treasurer to pay a warrant drawn in favor of relator for services as secretary of State. It is admitted that there is sufficient money in the treasury to pay this warrant, but respondent, as an excuse for his refusal to pay, claims there is no appropriation by the legislature with which to pay. Article vii., section 4 of the Constitution, fixes relator's salary, and provides that he shall receive the same as due, etc. Article v., section 34, provides: "No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof. . . ." Has no such appropriation been made? The word "appropriation" is defined by Webster as, "The act of setting apart or assigning to a particular use or person; . . . the application to a special use or purpose . . . as of money to carry out some public object." Under this definition an appropriation has been made by article vii., section 4 of the Constitution. It applies or directs the payment to the officers therein named of certain sums of money to pay their respective salaries for the duties of their offices. Another meaning of the word "appropriation," as used in section 34, article v. of the Constitution, is that no money shall be drawn from the State treasury, except in pursuance of law. (*McCauley v. Brooks*, 16 Cal. 29.) Section 4, article vii. of the Constitution, provides that the officers therein named shall, at certain times,

receive certain sums of money. To pay these salaries the money would be drawn in pursuance of law. Section 4, article vii., is itself an appropriation, and of course is one "made by law." The appropriation, therefore, having been made by the constitution, it is not essential that the legislature should act to give it validity. *Thomas v. Owens*, 4 Md. 199, is on all fours with the case at bar, and we submit is decisive of the questions raised by respondent. (See, also, *State v. Weston*, 4 Neb. 216; *State v. Bordelon*, 6 La. An. 68.) The constitutional provisions relating to salaries is self-executing. (Endlich Int. Stat. § 540; Cooley's Constitutional Limitations, p. 100; *Reynolds v. Taylor*, 43 Ala. 420.) Upon the presentation of relator's warrant to the treasurer, it became his duty to pay it out of funds in his possession "not otherwise appropriated." (Comp. Stats. § 1123, fifth div.) "When a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* therefor." (*Fisk v. Outhbert*, 2 Mont. 604.)

Henri J. Haskell, Attorney-General, for Respondent.

No brief on file.

BLAKE, C. J.— This is an application to the court for a writ of mandate to be issued to Richard O. Hickman, as the State treasurer of the State of Montana, commanding him to pay forthwith, out of such moneys as may be in the treasury of the State, and not otherwise appropriated, a certain warrant hereinafter described. It appears from the affidavit on the application of Louis Rotwitt, the party beneficially interested, and is admitted by the respondent, that Rotwitt is the duly elected, qualified, and acting secretary of the State of Montana. That he entered upon the discharge of his duties upon the eleventh day of November, 1889, and has ever since that date continued to perform the same. That upon the tenth day of February, 1890, he presented his account in the sum of \$416.67 against the State for his compensation or salary as such secretary of the State for the quarter ending on the thirty-first day of December, 1889, to Edwin A. Kenney, who was then and is now the duly elected, qualified, and acting auditor of the State of Montana, for settle-

ment, audit, and allowance. That thereupon the said Kenney, as such State auditor, settled, audited, and allowed said account for the said sum, and then drew his warrant therefor on the said State treasurer, as follows:—

“No. 9,264. STATE OF MONTANA, COUNTY OF LEWIS
AND CLARKE, HELENA, M. T., Feb. 10, 1890.

“Territorial warrant. Original.

“The treasurer will pay to L. Rotwitt or order four hundred and sixteen and 67-100 dollars, for salary as secretary of State for quarter ending Dec. 31, 1889, out of any moneys in the treasury not otherwise appropriated.

“\$416.67-100. E. A. KENNEY, State Auditor.”

(Indorsement:) “Feby. 10, 1890.

“Presented, but not paid for want of an appropriation.

“R. O. HICKMAN, State Treasurer.”

That he presented the said warrant to the said Hickman, as such State treasurer, and demanded payment thereof, and that payment thereof was refused, and the same is wholly unpaid; and that there is now in the treasury of the State, and in possession of the said Hickman, as such State treasurer, the sum of \$40,000.

The alternative writ was issued, and on the return thereof said Hickman made the following answer, to wit: “That no provision has been made by law for the payment of this or any other warrant issued to the State officers of Montana for their services rendered as such officers.” The relator then demurred to this answer upon the ground that it does not state facts sufficient to constitute a defense.

There is no statute which makes an appropriation or otherwise provides for the payment of this warrant, and the sole question for decision depends upon the interpretation of the following clauses of the Constitution:—

“Until otherwise provided by law, the governor, secretary of State, State auditor, treasurer, attorney-general, and superintendent of public instruction, shall quarterly, as due, during their continuance in office, receive for their services compensation, which is fixed as follows: Secretary of State, \$3,000 per annum. The compensation enumerated shall be in full for all services by said officers respectively rendered in any

official capacity or employment whatever during their respective terms of office, and the salary of no official shall be increased during his term of office. No officer named in this section shall receive for the performance of any official duty any fee for his own use. . . .” (Art. vii. § 4.)

“Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election. . . .” (Art. v. § 31.)

“No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt.” (Art. v. § 34.)

“The State auditor and State treasurer shall perform such duties as are prescribed in this constitution and by the laws of the State.” (Art. vii. § 1.)

This court, in the cases of *State v. Ah Jim*, ante, p. 167, and *Thompson v. Kenney*, ante, p. 223, inquired into the effect of the provisions of the constitution upon the statutes of the Territory and State, and a repetition of the citations and conclusions therein will be avoided. We content ourselves with the observation that the foregoing language of the constitution and the laws concerning the territorial treasurer are applicable to this proceeding. What, then, are “appropriations made by law?” A majority of the States of the American Union have not adopted constitutions which specify the salaries that should be paid to their officers. Numerous cases can be found in their courts which determine the necessity of an appropriation by the law-making department before the payment of money can be authorized by the custodian of the public funds. But the fundamental law of this State constitutes an exception in this important feature, and the decisions of such courts do not enlighten us. All the adjudications which construe constitutional phrases similar to those of Montana concur in their declaration of principles.

The leading case is that of *Thomas v. Owens*, 4 Md. 189, which was decided in 1853 by the court of appeals, and the opinion was delivered by the profound jurist, Chief Justice Le Grand, after a thorough examination. Thomas was the controller of the State, and applied for a writ of *mandamus* to be

directed to Owens, the State treasurer, commanding him to pay the amount of a draft drawn in payment of his salary. Owens refused payment on several grounds, including the following: "That no sufficient appropriation has been made by law specifying a sum applicable to the payment of the amount claimed by the petitioner." The gravity of the investigation, and the lucid reasoning of the court, induce us to be liberal in the use of excerpts. "The inquiry, then, is, is there an appropriation for the period intervening between the 10th of December, 1851, the time from which we think he is entitled to pay, and the first day of January, 1852?"

"We are of opinion the constitution, *proprio vigore*, makes such appropriation. Under our system of government, its powers are wisely distributed to different departments. Each and all are subordinate to the constitution, which creates and defines their limits. Whatever it commands is the supreme and uncontrollable law of the land. This is not denied *directly*, although it is inferentially, substantially, and *practically*. It is said that, inasmuch as the twentieth section of the third article of the Constitution declares, 'No money shall be drawn from the treasury of the State except in accordance with an appropriation made *by law*,' that an *act of assembly* must precede the withdrawal; and inasmuch as none such has been passed covering the period antecedent to the first of January, 1852, there is therefore no appropriation *by law* for that time. To this reasoning we cannot yield our consent.

"In the construction of any instrument, the whole paper ought to be considered, that the will of its framers may be truly and accurately ascertained. The objects contemplated, and the purposes to be subserved, should be constantly kept in view, and the language used interpreted in reference to the manifest intent. Now, what could have been the purpose of the clause in the constitution to which we have referred? It was obviously inserted to prevent the expenditure of the people's treasure *without their consent*, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation."

After citing Story on Constitution (3d ed.), § 1348, and 1 Tuck. Blackst. Com. 362, the opinion continues: "These being

the purposes and objects of the clause, the question is: *Have the people given their consent to the payment of the salary of the comptroller?* That they have done so is palpably manifest. They have said he 'shall receive an annual salary of \$2,500.' They have not merely said he may *claim* such a sum, but, emphatically, that he 'shall *receive*' it. It is impossible for human language to be less ambiguous or more positive. The people, in their *organic* law, which is paramount to all other law, have not only given their *consent*, but they have imperatively issued their commands that the particular officer '*shall receive*' it. How is their will obeyed if it be within the power of the treasurer, or any one else, to withhold it from caprice, unfaithfulness to duty, or from mistaken judgment? To allow of such a power in that officer would be to put him above the constitution, whose creature he is. It would be to invest him with authority to annul the sovereign will; in fact, to stop the wheels of government, and reduce things into the wildest confusion. The constitution has said the officer '*shall receive*' his salary; and this *fiat* of the supreme will is not to be nullified by the mere *ipse dixit* of a mere *ministerial* officer; for such, and none other, is the treasurer. In assigning the powers of government to three different departments, the constitution intended to secure to each its independency of action; and the more certainly and effectually to insure this, it has ascertained and appropriated the salary they are severally to *receive*, and it has inhibited the legislature from *diminishing* it. Were it not for such a provision, the whole government would exist only by permission of the legislature. It can only be carried on through the instrumentality of individuals, and their services can only be obtained by being paid for. The framers of the constitution, and the people who adopted it, aware of this, determined not to submit the durability of their work to the caprice, passion, or prejudice which possibly might, at times of great excitement, triumphantly rule the action of the legislature; and, therefore, wisely did the work themselves by ingrafting in the organic law a provision for the protection of those who should be charged with its execution. In other words, *they* made the appropriation.

"An opposite interpretation would countenance this paradox: that a co-ordinate branch of the government could stop its whole

machinery by refusing to pay the salaries of those upon whom is devolved the discharge of the duties of the other branches; and this, too, when the constitution *expressly* declares that these officers '*shall receive*' their salaries, and that they '*shall not be diminished!*' 'It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.' (*Marbury v. Madison*, 1 Cranch, 178.)

"Now, it is presumed it would not be contended by any one, however hazardous, that if the legislature were to pass an act *diminishing* the salary of the governor, or of any other officer whose salary is fixed by the constitution, that such an exercise of power would be rightful and constitutional. If it be not competent to the legislature to take away a *part*, by what process of reasoning can it be maintained that they can take away the *whole*? And yet this is the extent to which the argument addressed to us goes. It seems to us to be but necessary to state the proposition to cause its instantaneous rejection. We hold, for the reasons we have assigned, the people have given their *consent* to the payment of the salaries fixed in the constitution, by declaring the amount '*shall*' be '*received*' by the particular officer; and that this is an appropriation by *law*—by the *supreme law* of the State."

The case of *Thomas v. Owens*, *supra*, is commented on in *Green v. Purnell*, 12 Md. 333, and the court said: "There, the petition asked for a *mandamus* requiring the treasurer of the State to pay the comptroller, upon his warrant, the amount of his salary, which is regulated by the constitution, and, of course, duly appropriated by law."

In *State ex rel. Roberts v. Weston*, 4 Neb. 216, the "case raises the question of the authority of the State auditor to draw warrants upon the State treasurer for the payment of the salaries of the State officers when no appropriation therefor has been made by the legislature." The constitution of that State provides that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." "If this clause," says Chief Justice Lake, "had limited the appropriation which it requires to an act of the legislature, there might

be some force in the objection urged. But it only requires a specific appropriation '*made by law*;' and we are clearly of the opinion that this may be accomplished just as effectually by the constitution as by legislative enactment." The court further says: "In the case of *Reynolds, Auditor, v. Taylor*, 43 Ala. 420, it was held that if the salary of a public officer is fixed, and the times of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to draw his warrant for its payment. But the case of *Thomas, Comptroller, v. Owens*, 4 Md. 189, seems to be more directly in point. It was there held that when the constitution declared the amount to be paid an officer, that it was an appropriation made *by law*, and no legislative act was necessary." In *State ex rel. Brown v. Weston*, 6 Neb. 16, the court explains the decision in *State ex rel. Roberts v. Weston, supra*, and asserts that "it reaches only those officers who hold by virtue of the constitution itself, and not to those who hold their offices at the will of the legislature;" and the "appropriation *made by law* may be done either by direction of the constitution itself—that being the supreme law in the State—or by the legislature." We do not know of any rule to the contrary where the same constitutional provisions exist which are embodied in the supreme law of this State. An illustration of the principles which are applied where salaries of the officers are not prescribed by the constitution, and the case of *Thomas v. Owens, supra*, is not followed, may be found in *Myers v. English*, 9 Cal. 348. This was an application for a writ of *mandamus* to compel the State treasurer to pay certain warrants drawn by the comptroller on account of the salary of a district judge. The constitution provided that the judges of the District Court shall severally, at stated times during their continuation in office, receive for their services a compensation, to be paid out of the treasury, which shall not be increased or diminished during the term for which they shall have been elected. (Art. vi. § 15.) Another clause is the following: "No money shall be drawn from the treasury but in consequence of appropriations made by law." (Art. iv. § 23.) It was correctly held by the court that it was necessary for the legislature to define the amount of the salary, and make an appropriation for the payment thereof, before this remedy could be enforced.

This view of the constitution of a State had been adopted by the Supreme Court of the United States, in construing the clause of the federal constitution which declares that no State shall pass any "law impairing the obligation of contracts." Mr. Justice Swayne, in *Mississippi etc. R. R. Co. v. McClure*, 10 Wall. 515, asserts that "the constitution of a State is undoubtedly a law, within the meaning of this prohibition." In *White v. Hart*, 13 Wall. 652, the court holds "that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition, they are substantially the same thing." (*Gunn v. Barry*, 15 Wall. 623; *Town of Concord v. Savings Bank*, 92 U. S. 630; *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 672.)

We cannot add anything to the discussion of this vital proposition. The doctrines which were announced in *Thomas v. Owens*, *supra*, have been accepted for years without a question, and have remained inflexible under every test. The framers of the constitution of this State numbered upon their roll most eminent jurists and lawyers. They studied with wisdom and ability the charters which the people had granted to the States of the Union, in their efforts to obtain the best articles from all. They knew the precedents which have been enumerated, and the canons of interpretation which had been formulated by the courts, and deliberately created the sections of the constitution which fix the salaries of many State officers. In their action upon this subject they did not incorporate the provisions which are frequently in force in the instruments of this solemn character, and did not permit the legislature to have this great power. In order that there should be no erroneous construction of the clauses under examination, the following section was adopted: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Art. iii. § 29.) When, therefore, it is plainly declared that the secretary of State, or any other officer, shall receive a certain sum as compensation for his services, an appropriation is "made by law," and the proper officer is empowered to draw his warrant on the State treasurer in pursuance thereof; and the respondent is required to pay the above-described war-

rant to the relator. The demurrer is sustained, and the respondent abiding by his answer and return, it is therefore ordered that a peremptory writ of mandate be issued forthwith according to the prayer of the application herein.

HARWOOD, J., and DE WITT, J., concur.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
AT THE
APRIL TERM, 1890.

PRESENT:

Hon. HENRY N. BLAKE, Chief Justice.
Hon. WILLIAM H. DE WITT, } Associate Justices.
Hon. EDGAR N. HARWOOD, }

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IN RE THOMPSON.

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HABEAS CORPUS — *Instruction — Trial — Verdict.* — Where the defendant, in a criminal trial, at the close of the case for the State, asks for an instruction to acquit, and the jury, though instructed that they may find a verdict of not guilty, return a verdict of guilty, he has had a trial as contemplated by law, though he lost his opportunity to testify by submitting his case to the jury upon the supposed failure of the prosecution, and cannot be released on habeas corpus. Irregularities in the verdict and judgment cannot be reviewed on habeas corpus.

OBJECTIONS — *Misunderstanding between judge and counsel — Discharge of jury — Bills of exception.* — In the case at bar, after the rendition of the verdict, the court asked defendant's counsel if he had any objection to the discharge of the jury, and understanding him to say, "I have none," discharged the jury; but counsel asserts that he objected in the words "I have." *Held*, that though the objection was insufficient, this court is bound by the recollection of the trial judge who certified the bill of exceptions. (Cases of *Helena v. Albertose*, 8 Mont. 499; *Hale v. Park Ditch Co.* 2 Mont. 498, cited.)

VERDICT — *Amendments.* — After a verdict is rendered and recorded and the jury discharged, the province of the jury is exhausted, and the verdict cannot then be changed in substance though the court has the power to amend it as to informalities.

HABEAS CORPUS — *Insufficiency of evidence to support verdict.* — On habeas corpus, this court cannot consider an objection that the verdict is null and void because contrary to the decision of the trial court that the evidence was insufficient, as the remedy for such error is a motion for a new trial.

On petition for a writ of habeas corpus.

Statement of facts, prepared by the judge delivering the opinion.

The defendant was indicted in the Fifth Judicial District for rape. He was placed upon trial before a jury. After the State had produced all the testimony at its command, the defendant asked the court to peremptorily instruct the jury to acquit. The court declined to give the instruction in terms as requested, but gave the following: "The State having failed to make out their case, gentlemen of the jury, you may find a verdict of not guilty." The jury then retired to consider their verdict. At no time before their retirement did defendant produce or offer any evidence in his defense. The jury returned the following verdict: "We, the jury, do find from the evidence produced by the State that the defendant Thompson is guilty of the crime charged in the indictment, notwithstanding the instructions of the court." After the rendition of this verdict the court asked counsel if they had any objections why the jury should not be discharged. Counsel for defendant asserts that he replied, "I have." The court understood him to say, "I have none," and discharged the jury. Then defendant's counsel demanded that the trial proceed, and that he be allowed to introduce testimony in his behalf. This the court denied, and sentenced the defendant to imprisonment in the penitentiary. The defendant, the petitioner herein, seeks a writ of habeas corpus, and asks for his discharge from the imprisonment, the result of such sentence. By the petition, and from the bill of exceptions used upon the hearing, the above facts were presented to this court.

Word & Smith, for Petitioner.

Under the writ of habeas corpus the court can always inquire into the lawfulness or legality of the imprisonment of any person appealing thereto. If the judgment is unlawful or void, the court will discharge any person confined thereby upon application for writ of habeas corpus. (*Ex parte Yeger*, 8 Wall. 101; *Ex parte Gibson*, 31 Cal. 619; *Territory ex rel. McCan v. Sheriff of Gallatin County*, 6 Mont. 297; *Church on Habeas Corpus*,

§§ 271, 348, 362, 366, 370, 371.) We are not to be understood as urging herein that a mere irregularity in the manner of procedure will be such an unlawful imprisonment as the court will grant relief from on habeas corpus. But if there is such a defect in the law, or the judgment was arrived at in a manner unknown, or contrary to the law, then such judgment is void, and the court can and ought to release any one who is thus unlawfully held. (See note on p. 66, Church on Habeas Corpus; Const. Mont. art. iii. § 27.) We contend in this case that there never has been a trial. The trial guaranteed by the constitution is such a trial as was known to the common law. In order to ascertain what a trial by jury was, it is necessary to examine the subject as we find the same in 3 Sharswood's Blackstone's Com. page 366, side page 367. But we are not compelled to rely upon what was meant by a trial by jury, under the common law, for our statute has crystallized the common law and made so plain of what a trial consists that even "a fool may read as he runs." (§ 307, p. 461, Comp. Stats.) A criminal trial once commenced must be carried to its close, and a failure to finish it is equivalent to an acquittal of the defendant. (*Butler v. McMillen*, 13 Kan. 391.) In the case at bar there was no trial, the verdict was rendered and sentence pronounced before the trial ended; the jury was discharged over the protest of the petitioner's attorney. The instruction given by the court to the jury, directing a verdict of not guilty, is the correct law and practice of such a case as is presented in the bill of exceptions. (*Territory v. Hanna*, 5 Mont. 248.) The question of the legal sufficiency of the evidence in any given case is a question for the court and not for the jury. (Thompson on Trials, §§ 2242, 2243, 2244; *Clarke's Adm'r v. Marriott's Adm'r* 8 Gill, 334; *Harris v. Woody*, 9 Mo. 113; *Commrs. v. Clark*, 94 U. S. 284; *Pleasants v. Fant*, 22 Wall. 120.) If, as we assert, the court had the power to decide upon the legal sufficiency of the evidence, and as the court actually did pass upon the legal sufficiency of the evidence, and instructed the jury to return a verdict of not guilty, then a verdict of guilty is in law absolutely null and void, and the judgment thereafter entered is also void, being without law to support it. The sentence is illegal and void, and hence the court on a writ of habeas corpus will dis-

charge the petitioner. (See note on p. 225, vol. 9, Am. & Eng. Encycl. of Law; *Ex parte Wilson*, 114 U. S. 422.)

Henri J. Haskell, Attorney-General, and *H. J. Burleigh*, for the State, *contra*.

The petition alleges that the said Thompson is confined upon a commitment issued upon a void judgment, thereby admitting the jurisdiction of the court. Where the person is confined upon a final judgment, or upon any process issued upon such judgment, the writ must not issue. (§ 1182, p. 977, Comp. Stats.; *Ex parte Winston*, 9 Nev. 74.) The allegation in the petition, that the sentence and judgment are absolutely void and worthless in law, is a conclusion of law and not a statement of fact. (*Ex parte Deny*, 10 Nev. 212.) The petitioner disclaims against the right exercised by the jury in rendering a verdict of guilty. He assumes that they must in law obey the instructions of the court. When the defendant moved the court to instruct the jury to bring in a verdict of not guilty, he placed himself in the same position as he would have been had he offered evidence in his behalf and rested. His motion was in effect to rest his case. He gambled for a verdict and lost. The writ of habeas corpus cannot be made, unless it be by express statute, to perform the functions of a writ of error, in bringing under review a judgment or sentence of a competent tribunal, simply for errors or irregularities in the proceedings, or in the rendition of the judgment or sentence; that must be done by some more direct and appropriate proceeding. (*State v. Glenn*, 54 Md. 608; *State v. Bell*, 4 Gill, 301; *Rex v. Suddis*, 1 East, 306; *Ex parte Watkins*, 3 Peters, 193; *Ex parte Reed*, 100 U. S. 13, 23.) An erroneous judgment is defined in *Ex parte Parks*, 93 U. S. 21. It is contended by the petitioner that by error in the proceedings at the trial and the rendition of the judgment on the verdict, under and by which he is imprisoned, constitutes the ground for the issuance of the writ. In this he is in error. The general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by habeas corpus. (*Ex parte Siebold*, 100 U. S. 375.) The only ground on which this court, or any court, without

some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. (*Ex parte Siebold, supra.*) We take the ground that the most that can be claimed by the petitioner is that the judgment is erroneous, hence to issue a writ of habeas corpus would be to make the writ serve as a writ of error. We are satisfied with the doctrine laid down by Bradley, J., in *Ex parte Winston*, 9 Nev. 75, wherein he says: "A writ of habeas corpus is not a writ of error. It cannot be used to authorize the exercise of appellate jurisdiction. On a habeas corpus the judgment of an inferior court cannot be disregarded. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until reversed; and when the imprisonment is under process, valid on its face, it will be deemed *prima facie* legal, and if the petitioner fails to show a want of jurisdiction in the magistrate or court whence it emanated, his body must be remanded to custody." (*People v. Cavanaugh*, 2 Parker, Cr. C. 658; *People v. McCormack*, 4 Parker, Cr. C. 18; *People v. Cassels*, 5 Hill, 167; *Williamson's Case*, 26 Pa. St. 17; *Ex parte Toney*, 11 Mo. 662; *In re O'Connor*, 6 Wis. 290; *Platt v. Harrison*, 6 Iowa, 80; *Ex parte Watkins*, 3 Peters, 193; *In re Callicot*, 8 Blatchf. 89; *Ex parte McCullough*, 35 Cal. 100; *Ex parte Murray*, 43 Cal. 457; *Ex parte Fisher*, 6 Neb. 311; *Commonw. v. Deacon*, 8 Serg. & R. 72.) In Texas the rule is that the court will not go behind the commitment, and in our judgment, conforms to the rule laid down in section 1182 of our statute. In *Ex parte Ezell*, 40 Tex. 451, Roberts, C. J., says: "When the application for the writ of habeas corpus shows that the applicant is restrained of his liberty by a sheriff, acting under a commitment issued by the District Court after trial and judgment of conviction for a felony, the writ will not be awarded." This doctrine is affirmed in *Ex parte Fuller*, 19 Tex. App. 242; *Ex parte McGrew*, 40 Tex. 476; *Darrah v. Westerlage*, 44 Tex. 388; *Matter of Underwood*, 30 Mich. 502; Church on Habeas Corpus, p. 483, § 366; Freeman on Judgments (3d ed.), § 621; *In re Blair*, 4 Wis. 532; *In re Perry*, 30 Wis. 271; *Hauser v.*

Wisconsin, 33 Wis. 680; *Ex parte Crandall*, 34 Wis. 179; *Ex parte Semler*, 41 Wis. 523; *Ex parte McKivett*, 55 Ala. 238; *Ex parte Van Hagan*, 25 Ohio St. 432; *Ex parte Shaw*, 7 Ohio St. 81; *Ex parte Hubbard*, 65 Ala. 473; *Ex parte Burnett*, 30 Ala. 461; *Ex parte Simmons*, 62 Ala. 416; *Kirby v. State*, 62 Ala. 55; *Ex parte Granice*, 51 Cal. 375; *Ex parte McLaughlin*, 41 Cal. 211; *Ex parte Hartman*, 44 Cal. 35. A writ of habeas corpus cannot be made to perform the functions of a writ of error. To warrant the discharge of the prisoner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. (*Ex parte Reed*, 100 U. S. 23; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Milligan*, 4 Wall. 2.) The authorities cited in *Ex parte Gibson*, 31 Cal. 628, are conclusive of the case now under consideration.

DE WITT, J.—The petitioner purports not to contend that the writ of habeas corpus is a writ of error. He announces his position to be that the judgment of the District Court, by virtue of which he is confined, is null and void. If this be correct, the writ lies. The Fifth District Court was a court of competent criminal jurisdiction. It had jurisdiction of the person of the defendant, and of the offense. It had jurisdiction to pronounce the judgment in question. The petitioner is in custody upon a final judgment of a competent court.

The statute of the State upon the subject of habeas corpus has the following provisions: "Sec. 1182. It shall be the duty of such judge [or court before which the petitioner is brought], if the time during which such party may be legally detained in custody has not expired, to remand such party, if it appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or upon any process issued upon such judgment, or decree, or in cases of contempt of court. Sec. 1183. If it appear upon the return of the writ of habeas corpus, that the prisoner is in custody by virtue of the process from any court in the Territory [State], or judge or officer thereof, such prisoner may be discharged in [any] of the following cases, subject to the restrictions of the last preceding section: *Fourth*, when the process, though proper in form, has been in a case not

allowed by law. . . . *Sixth*, where the imprisonment is not authorized by any judgment, order, or decree of any court, nor by any provision of law." The petitioner relies upon the above laws. His argument may be stated in two points: *First*, the judgment is void because there never was any trial; *second*, the court having decided that the evidence was legally insufficient, the verdict of the jury contrary to such decision is void, and consequently the judgment.

We will examine the first proposition. The statute declares the common law, and defines what a trial is. Criminal Practice Act: "Sec. 307. The jury being impaneled and sworn, the trial shall proceed in the following order: *First*, the attorney prosecuting must state the case, and offer the evidence in support of the prosecution; *second*, the defendant or his counsel may then state his defense, and offer evidence in support thereof." Other provisions follow, which are not here material. The petitioner contends that the proceedings in the District Court which resulted in the judgment lacked a vital element of a trial, in that defendant was deprived of testifying or producing witnesses in his own behalf, and that therefore there was no trial as contemplated by law, and consequently no verdict or judgment. The defendant was not precluded by the court from making his defense. At the close of the case for the State, defendant offered no evidence, as allowed by subdivision 2, section 307, *supra*. He was not obliged to testify or offer witnesses. He submitted his case, as he had the right, upon what he may have considered the weakness or the failure of the prosecution. The practical result of the defendant's asking the court to instruct the jury to acquit, and the final action of the jury, was that the defendant lost his opportunity to testify and offer witnesses in his behalf.

Again, the petitioner urges that he was precluded from offering evidence, upon his demand so to do, after the jury had rendered their verdict. There seems, from the bill of exceptions, to have been some misunderstanding between the judge and the defendant's counsel as to the discharge of the jury—a misunderstanding which, we take occasion to say, was thoroughly honest on each side. The judge understood counsel to consent to the discharge. Counsel claims that he objected, however, in these words, "I have." This is not a good objection. (See

City of Helena v. Albertose, 8 Mont. 499.) This court, however, is bound by the recollection of the judge below, who certifies the bill of exceptions, unless the same be amended as provided by section 328, Criminal Practice Act, and section 291, Code of Civil Procedure. (*Hale v. Park Ditch Co.* 2 Mont. 498.)

It is clear that defendant's demand to introduce his testimony was subsequent to the discharge of the jury. When the verdict is rendered and recorded, and the jury discharged, the jury is *functus officio*. Prior to that time the verdict is in the control of the jury, in some respects. After those events the province of the jury is exhausted. The verdict cannot then be changed in substance. This view does not conflict with the power of the court to amend a verdict as to informalities. (*Walters v. Junkins*, 16 Serg. & R. 414; *McConnell v. Linton*, 4 Watts, 357; *Bishop v. Mugler*, 33 Kan. 145; *Root v. Sherwood*, 6 Johns. 68; *Settle v. Alison*, 8 Ga. 201; *State v. Waterman*, 1 Nev. 551; *Snell v. Bangor Navigation Co.* 30 Me. 337.)

If the verdict, when once the record of the court, cannot be changed in substance or materiality, then, *a fortiori*, a verdict cannot be ignored, and the jury allowed to reopen the case, and hear further testimony, which a party did not choose to present on the trial at the time when he had opportunity so to do. To countenance such a practice would be to allow every party in an action, criminal or civil, to submit his case on what he might deem his chances of success, and, if the verdict was not to his liking, come back with further evidence. We are of opinion that petitioner did have a trial. We cannot on this hearing inquire what irregularities or errors occurred thereat.

As to petitioner's second point, that the verdict is null and void because contrary to the decision of the trial court that the evidence was insufficient, it is tantamount to the assertion that the verdict and the consequent judgment are void because the verdict is contrary to the evidence and instructions of the court. The remedy for such alleged error is a motion for a new trial. This court, on habeas corpus, cannot inquire into such matters. If it could, the writ of habeas corpus would perform all the functions of appeal, writ of error, motion for a new trial, and *certiorari*. Such is not the practice.

The propositions presented in this application are by no means

new. There is a rich and abundant legal literature upon the subject. We refer to a few of the cases sustaining our views: *Ex parte Toney*, 11 Mo. 662; *Ex parte Winston*, 9 Nev. 71; *Ex parte Lange*, 18 Wall. 163; *Ex parte Reed*, 100 U. S. 13; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Gibson*, 31 Cal. 620; *Petition of Semler*, 41 Wis. 517; *Ex parte Watkins*, 3 Peters, 193; *Ex parte Parks*, 93 U. S. 18; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Fuller*, 19 Tex. App. 241; *Ex parte Granice*, 51 Cal. 375; *Ex parte Fisher*, 6 Nev. 309; *State v. Glenn*, 54 Md. 572; Church on Habeas Corpus, ch. 25.

The petitioner is remanded.

BLAKE, C. J., and HARWOOD, J., concur.

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STATE EX REL. JOURNAL PUBLISHING COMPANY, APPELLANT, v. E. A. KENNEY, AUDITOR, RESPONDENT.

MANDAMUS — *Constitutional law* — *Appropriations* — *State officers*. — The relator applied for a writ of mandate to compel the State auditor to draw his warrant for the payment of an account due it for public printing, under section 1636 of the fifth division of the Compiled Statutes, which provides that the governor and auditor shall examine the "itemized account" of the contractor, which shall be rendered "once in each month," and "if they find it to be correct and in accordance with the provisions of this chapter, the auditor shall draw his warrant on the territorial treasurer for the payment of the same." *Held*, that under section 34, article v. of the Constitution, which provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the public officer in pursuance thereof, except interest on the public debt" and section 10, article xii., which provides that "no money shall be drawn from the treasury but in pursuance of specific appropriations made by law," the relator was not entitled to the relief demanded in the absence of a lawful appropriation. *Held, also*, that the relator had a plain, speedy, and adequate remedy in an application to the legislative assembly for an appropriation to pay the claim.

CONTRACTS OF A STATE. — The executory contracts of a State, as its promises to pay for services rendered under agreements authorized by law, have no legal obligation. They depend upon good faith for their performance, and cannot be enforced at law. (Cases of *Lanufford v. King*, 1 Mont. 38, cited; *Fisk v. Cuthbert*, 2 Mont. 593, distinguished.)

Appeal from First Judicial District, Lewis and Clarke County.

Relator's petition for a writ of mandate was denied by HUNT, J.

McOutcheon & McIntyre, for Appellant.

The court below based its action upon the fact that the last legislature failed to make any appropriation, and that this case falls within section 34, article v. of the Constitution. In this we think the court erred. It is the plain duty of the auditor to issue a warrant to the relator for the performance of this work. (Comp. Stats. p. 1094, § 1636; p. 960, § 1122.) Appellant's contract is executed in pursuance of the statute. (Comp. Stats. p. 1091, § 1626.) The mine inspector is an officer of the Territory and of the State, and his report is required to be printed as are other reports of officers. (16th Sess. Laws, p. 164, § 13.) Relator has performed his part of the contract and has rendered its account as provided by law: it thereupon became the duty of the auditor to draw his warrant on the State treasurer for the payment of the same. (Comp. Stats. p. 1094, § 1636.) It will be observed that this warrant is not *in payment* but *for the payment* of the work done. The printing law is a law of the State. (Const. Schedule, § 1.) This contract has been assumed by the State. (Const. Schedule, § 9.) If the territorial auditor could not legally refuse to draw his warrant when we were still under the territorial form of government, the State auditor cannot. Compiled Statutes, page 1094, section 1636, is mandatory, and under the provisions of the constitution, *supra*, is as binding on the State auditor as it formerly was on the territorial auditor. It is clearly proper to draw warrants even when there are no funds in the treasury, otherwise the Compiled Statutes, page 960, section 1126, and page 961, section 1129, would be nugatory. The duty of the State auditor to draw this warrant is entirely independent of the fact whether there is any money in the State treasury, or whether there has been an appropriation of the same to the payment of this debt or not. The auditor does not pay the claim—he simply audits or liquidates it. *People v. Secretary of State*, 58 Ill. 90, seems to us to be conclusive of this case. Illinois has the same constitutional provision as Montana, that no funds shall be drawn out of the State treasury except on appropriations made by law, and upon warrants drawn by the proper officer. (Illinois Const. art. iv. § 17; Stimson's Am. Stat. Law,

p. 81, § 320.) Section 34, article v. of the Constitution is clearly a limitation upon the power of the State treasurer and not upon the auditor. It simply means that before the treasurer can act, two things must have occurred: *First*, an appropriation; *second*, a warrant drawn by the proper officer in pursuance of such appropriation. It has nothing to do with the auditor's statutory duty to audit claim against the State. In the case at bar, relator's compensation is just as certain as if the amount had been inserted in the contract. Compiled Statutes, page 1094, section 1635, specifies the rates for printing and how the compensation is to be ascertained. The maxim *certum est*, etc., is therefore applicable. But even if it were not fixed the auditor could not refuse, therefore, to audit the claim. (*Fisk v. Outhbert*, 2 Mont. 599.) Appellant claims that it is entitled to its warrant under the statute irrespective of the fact of any appropriation having been made. If an appropriation is essential to entitle it to receive the money for its warrant, that question will properly come up on the refusal of the treasurer to pay, exactly as was done in the case of *State ex rel. Rotwitt v. Hickman*, decided at the January term of this court. (*Brown v. Fleischner*, 4 Or. 147, 148.) Compiled Statutes, page 1094, section 1636, is itself an appropriation. It directs the payment or the application of moneys to a certain use, to carry out a public object, which is the meaning of the word "appropriation" as defined by lexicographers. Money drawn under its provisions would be paid in pursuance to law, which is also the meaning of the word "appropriation." (*McCauley v. Brooks*, 16 Cal. 29.)

Henri J. Haskell, Attorney-General, for Respondent.

It appears by the pleadings in this case that the petitioner herein has a contract with the State of Montana to do all of its printing at a specified rate, but it does not appear therein when the respondent shall pay. We take the ground that the petition must state, and that the petitioner must show, that there has been an appropriation made by law for the payment of this claim, and as well the warrant when drawn. In support of this proposition we refer the court to section 34, article v. of the Constitution, which reads as follows: "No money shall be paid

out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt." The appellant contends: (1) That an appropriation is not a prerequisite to authorize the auditor to draw his warrant; (2) that the drawing of the warrant is simply evidence of the fact that the claim is audited; (3) that the inhibition in section 34 applies solely to the State treasurer and not to the auditor; (4) that a failure of the auditor to draw his warrant renders nugatory sections 1126 and 1129, fifth division of the Compiled Statutes. We construe the words "in pursuance thereof" in section 34 to mean "in accordance with such appropriation"; therefore the auditor would be as strongly inhibited from drawing a warrant for any proper claim presented to him until the legislature had made a specific appropriation, as he is now. Webster bears us out fully in our construction of the words above quoted. He defines "pursuance": "A following out or after" — "in accordance with." "Done in consequence or prosecution of anything." Therefore the section would read: "No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in accordance with such appropriation." As to the second proposition of the appellant, we contend that it is not well taken, and considering the fact that what he terms "simply evidence of the fact that the claim is audited," is worth one hundred cents on the dollar, is an order on the State treasurer, and draws six per cent interest if there is no money in the treasury to pay the same. It is apparent that such "evidence" is a settlement of the claim, so far as the auditor is concerned, and that it being a promise to pay, is negotiable. The State accepts "evidence" like this in payment of taxes. (§ 1126, fifth div. Comp. Stats.) A warrant is in fact "an order on the State treasurer to pay a given sum out of the money in the State treasury not otherwise appropriated." (§ 1125 of said laws.) The warrant shows upon its face that the money to be paid thereon has been duly appropriated for that purpose. Our construction of section 34 answers the third as well as the first proposition of the appellant. Assuming that the petition must show that there has been an appropriation made by law, and that our construction of section 34 is

the correct rule, and there having been no appropriation made by law for the payment of appellant's claim, the auditor has no authority to draw a warrant therefor. (*Redding v. Bell*, 4 Cal. 333; *Myers v. English*, 9 Cal. 350.) The provisions of the constitution of the State of California at that time, concerning public moneys, was not unlike ours at the present time, and reads, "No money shall be drawn from the treasury but in consequence of appropriations made by law." (See, also, *People v. Burrows*, 27 Barb. 98; *People v. Tremain*, 29 Barb. 98; *Brown v. Fleischner*, 4 Or. 135.) We contend that in the absence of section 34, article v. of the Constitution, this appellant could not obtain the writ on his petition, for the reason that the inhibition on the State treasurer contained in article xli., as to payments of State funds, is as binding upon the auditor as upon the treasurer. We quote section 10 of article xii.: "All taxes levied for State purposes shall be paid into the State treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law." For a construction of this section we refer the court to the case of *State v. Wallich*, 12 Neb. 409. (See, also, *State v. Wallich*, 15 Neb. 458, 609.) An appropriation cannot be implied. (*State v. Wallich*, 16 Neb. 679.) Without an appropriation by the legislature, no funds once in the State treasury can be drawn out. (*State v. Liedtke*, 9 Neb. 468; *State v. Babcock*, 17 Neb. 613.) By a specific appropriation we understand an act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand. (*Stratton v. Green*, 45 Cal. 151; *Butler v. Bates*, 7 Cal. 138.) It is not contended on the part of the respondent that the State of Montana has not assumed this contract. The State accepted it with the condition that it would pay the sums found due appellant under the contract whenever the legislature would make an appropriation. This provision is applicable as well to claims against the State, existing prior to the constitution, as to those subsequent. (*Swann v. Buck*, 40 Miss. 299; *Hunsaker v. Borden*, 5 Cal. 290.)

BLAKE, C. J. — This is an appeal from the order of the court below, denying the application of the relator for a writ of man-

date, to compel the auditor of the State to draw his warrant on the treasurer of the State in payment of an account. The affidavit which accompanies the application is not controverted, and recites the following facts: The Journal Publishing Company entered March 11, 1889, into a contract with the Territory of Montana to do all the printing therefor which is required by law. The account of the printing and advertising done by this company for the inspector of mines, an officer of the State, under the contract, amounted to the sum of \$389.39, and was presented March 1, 1890, to Kenney, the auditor of the State. This account was examined by the governor and auditor of the State, and found to be correct March 4, 1890. Afterwards a demand was made of the auditor that he should draw his warrant on the treasurer of the State for the amount of the account in favor of the company, and the auditor refused to perform this act. Upon the hearing of the application it was adjudged that the writ of mandate be denied, upon the ground that the foregoing facts do not entitle the relator to this remedy.

It is conceded that the claim of the relator against the State is valid, and the defense of the respondent is based upon the failure of the legislature to make an appropriation for its payment.

The provisions of the constitution which are applicable to this controversy, declare that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the public officer in pursuance thereof, except interest on the public debt." (§ 34, art. v.) "No money shall be drawn from the treasury but in pursuance of specific appropriations made by law." (§ 10, art. xii.) In *State v. Hickman*, ante, page 370, it was decided that a clause of the constitution which fixed the salary of the secretary of State, and prescribed the times of its payment, was an appropriation made by law. It is obvious that this principle does not determine the question before us. The statute specifies the prices which shall be paid for the printing that has been authorized by the contract between the relator and the Territory. (Comp. Stats. div. 5, ch. xcvi.) The law further provides that the governor and auditor shall examine the "itemized account" of the contractor, which shall be rendered "once in each month," and "if they find it to be correct and in accordance with the provisions of this chapter,

the auditor shall draw his warrant on the territorial treasurer for the payment of the same." (Comp. Stats. fifth div. § 1636.) "The auditor of the Territory is hereby empowered to issue territorial warrants drawn upon the treasury of the Territory, in favor of all persons to whom the legislative assembly of the Territory may direct." (Comp. Stats. fifth div. § 1122.) The obligations of the Territory, under the terms of the contract with the relator for the public printing, have been assumed by the State, and the constitution in the most solemn manner protects and enforces the rights of individuals, associations, and corporations which existed at the time when Montana was admitted into the Union. (Art. xx. Schedule, §§ 1, 2, 9, 10, 12.) This historic event operated as a repeal or amendment of "all laws enacted by the legislative assembly of the Territory of Montana and in force," which were inconsistent with the constitution of the State. (Art. xx. Schedule, § 1.)

The writ of mandate shall be issued "to compel the performance of an act which the law specially enjoins as a duty resulting from an office." (Code Civ. Proc. § 566.) Are the foregoing provisions of the statute concerning printing consistent with the constitution? There is no law which appropriates in express language a certain sum for the payment of the claim of the relator. Is the auditor empowered, after the admission of the State into the Union, to draw his warrant according to the territorial statute, *supra*?

The Constitution of the United States provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law." (Art. i. § 9.) The leading case upon the interpretation of this clause is *Reeside v. Walker*, 11 How. 272. This was a petition for a writ of *mandamus* to direct the secretary of the treasury to enter upon the books of his department the sum of \$188,496.06 to the credit of, and to pay the same to, the plaintiff. Upon the trial of another action the jury returned a verdict, and certified that the United States was indebted in this amount to James Reeside. A final judgment was entered in his favor therefor, which was in full force when this proceeding was commenced by his executrix. Mr. Justice Woodbury, as the organ of the court, said: "No officer, however high, not even the President, much less a secretary of

the treasury, or treasurer, is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the treasury department, the plaintiff would be as far from having a claim on the secretary or treasurer to pay it as now. The difficulty in the way is the want of any appropriation by Congress to pay this claim. . . . Hence the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it. If Congress after that make such an appropriation, the treasury can, and doubtless will, discharge the claim without any *mandamus*; but without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made. The existence of this other and ordinary mode of redress, by resort to Congress, may be another reason against a *mandamus*, as that lies only when no other adequate remedy exists. (*Marbury v. Madison*, 1 Cranch, 137; *Kendall v. United States*, 12 Peters, 525.)"

The history of this vital clause of the constitution forms a grand part in the struggle for liberty between the people and monarchs of England. In *Magna Charta* it is confirmed that "no scutage or aid shall be imposed in our kingdom unless by the general council of our kingdom." In 1688, the act "for declaring the rights and liberties of the subject, and settling the succession of the crown" (or bill of rights), declared "that levying money for or to the use of the crown by pretense of prerogative, without grant of parliament for longer time, or in other manner than the same is or shall be granted, is illegal."

Words have changed in signification during the progress of time, but the principle has not been modified, and this bulwark of freedom has been preserved in the constitutions of the States of the Union. The decisions are in harmony with the doctrine of *Reeside v. Walker*, *supra*, although there have been dissensions respecting the acts of the legislative department to ascertain whether they are in legal effect appropriations. The Supreme Court of Indiana, in *Ristine v. State*, 20 Ind. 328, held

that the interest upon the public debt of the State could not be paid without a specific appropriation by the legislature. Mr. Justice Perkins, in the opinion, says: "There are some things which, plainly enough, are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the State is not an appropriation of money with which to redeem the pledge. . . . Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the legislature, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the State. An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury."

In *Swann v. Buck*, 40 Miss. 298, Mr. Justice Ellett delivered the opinion, and said: "The only remedy for a debt due by a State is by an application to the legislature to make an appropriation for its payment. Indeed, no money can be drawn from the treasury but in consequence of such an appropriation. . . . The grants and executed contracts of a State are contracts within the protection of the constitution. But its executory contracts, such as promises to pay money and the like, have no other than a moral sanction, and depend upon good faith for their performance." (See, also, *State v. Wallich*, 12 Neb. 407; *State v. Wallich*, 15 Neb. 609; *State v. Babcock*, 18 Neb. 221; *Stratton v. Green*, 45 Cal. 149; *Marshall v. Dunn*, 69 Cal. 223; *Brown v. Fleischner*, 4 Or. 132; *People v. Burrows*, 27 Barb. 89; *People v. Tremain*, 29 Barb. 96.)

Upwards of twenty years ago the Supreme Court of the Territory, in *Langford v. King*, 1 Mont. 38, thus expressed the law through Mr. Justice Knowles: "There is, then, no legal power to enforce territorial contracts. In other words, there is no obligation to territorial contracts. They rest simply upon the good faith of the Territory." The case of *Fisk v. Outhbert*, 2

Mont. 593, which is cited by the appellant, is rendered inapplicable by the adoption of the constitution of the State. We conclude from the authorities *supra*, that the respondent cannot draw his warrant upon the treasurer of the State in payment of the claim of the relator, in the absence of an appropriation by law. The foregoing prohibitions of the constitution refer to the auditor as well as the treasurer, and any other officer who is empowered to disburse the public funds, in pursuance of a lawful appropriation. To this extent the statute regulating printing, which requires the drawing of a warrant after the "itemized account" has been found correct by the governor and auditor, cannot be enforced at this time. The relator must apply to the legislative assembly of the State for relief, and this, according to the precedents, appears to be the "plain, speedy, and adequate remedy."

It is therefore ordered that the judgment of the court below be affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

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KILBY, APPELLANT, v. BAKER, RESPONDENT.

NEW TRIAL—Conflict in testimony—Where no reasons are given in the transcript for the action of the court below in granting a new trial, and there is a substantial conflict in the testimony, the judgment will be affirmed. (Cases of *Chauvin v. Valiton*, 7 Mont. 581; *Kircher v. Conrad*, ante, p. 191; *Landsman v. Thompson*, ante, p. 182, affirmed.)

Appeal from Seventh Judicial District, Yellowstone County.

Defendant's motion for a new trial was granted by LIDDELL, J.

R. T. Allen, for Appellant.

O. F. Goddard, for Respondent.

Setting aside the verdict of the jury was a matter of legal discretion, vested in the court below, and this court will not interfere with it unless abuse of that discretion is shown, and especially if there be a substantial conflict of evidence. (Hayne on New Trial and Appeal, §§ 97, 289; *O'Brien v. Brady*, 23 Cal. 243; *Drake v. Palmer*, 2 Cal. 177; *Speck v. Hoyt*, 3 Cal. 413; *Peters*

v. *Foss*, 16 Cal. 358; *Nooney v. Mahoney*, 30 Cal. 226; *Sharp v. Hoffman*, 79 Cal. 404; *Harnett v. C. P. R. R. Co.* 78 Cal. 31; *Minturn v. Bliss*, 77 Cal. 90.)

BLAKE, C. J.—This action was commenced to recover damages for the malicious prosecution of Kilby by Baker. The jury returned a verdict for the plaintiff, and the court below granted the motion of Baker for a new trial. No reasons are given in the transcript for this ruling, and the grounds which appear in the notice relate chiefly to the insufficiency of the evidence. There is a substantial conflict in the testimony of the parties, and we cannot say that there has been an abuse of judicial discretion. No questions of law for the guidance of the court at another trial have been brought to our attention, and the judgment must be affirmed, with costs. (*Chauvin v. Valiton*, 7 Mont. 581; *Kircher v. Conrad*, ante, p. 191; *Landsman v. Thompson*, ante, p. 182.)

DE WITT, J., concurs. HARWOOD, J., being disqualified, did not sit in this case.

WALLACE ET AL., APPELLANTS, v. LEWIS ET AL.,
RESPONDENTS.

ATTACHMENTS—*Time in which motion to dissolve may be made.*—Under section 200 of the Code of Civil Procedure, which provides, in substance, that the defendant may “at any time before the time for answering expires apply on motion to the court that the attachment be discharged, on the ground that the writ was improperly issued,” the motion must be made within the time in which the defendant shall appear and answer the summons. (*Case of Vaughn v. Dawes*, 7 Mont. 362, affirmed.)

SAME—*Motion to dissolve—Change of venue does not enlarge time.*—Where a motion to discharge an attachment is overruled, without prejudice to the renewal of the motion, upon a change of venue being granted, and the venue is subsequently changed, the time in which such motion may be made is not thereby enlarged.

SAME—*Discharge—Motions.*—In the case at bar, before the expiration of the time to answer the defendants moved to discharge the attachment, which motion was denied without prejudice to a renewal of the motion on a change of venue. A change of venue being granted, the defendants, after the expiration of the time to answer, again moved to discharge the attachment, using the same papers that had been filed on the former motion. *Held*, that a motion, being an application for an order, is not made by the filing of an application in writing alone, but by the moving of the court to grant the order, and the defendants’ second motion was too late.

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Appeal from Sixth Judicial District, Gallatin County.

This action was commenced in the District Court of Lewis and Clarke County. A change of venue was granted by HUNT, J., to Gallatin County on motion of the defendants. The order discharging the attachment was made by HENRY, J.

Statement of facts, prepared by the judge delivering the opinion.

The complaint is on a money demand, and was filed in the First District Court in and for Lewis and Clarke County, November 27, 1889. Summons was issued, and served on defendant Lewis December 2d, and on defendant Vaughn December 12th, each in Gallatin County, in the sixth district. Writ of attachment was issued November 27th, and levied on personal property November 29th. Lewis' time to appear expired January 11, 1890, and Vaughn's on January 21st. Before those dates each appeared by demurrer. A written application to dissolve the attachment was filed by defendants on January 9th. On the same day defendants filed written demand that the venue be changed to Gallatin County, in the sixth district. The application to discharge the attachment was heard by Hon. William H. Hunt, judge of the first district, in his court, January 15th. It was heard upon all the papers and proceedings in the case, and upon affidavits filed. The application was denied by Judge Hunt, January 15th, in the following order: "That said motion be overruled, without prejudice to defendants' renewing said motion, if a change of venue shall be granted herein." On January 17th the same judge made an order, on defendants' motion, changing the venue to Gallatin County. On March 5, 1890, before Hon. Frank Henry, judge of the sixth district, defendants moved to discharge the attachment. They used the same papers on the motion that had been filed and used in the first district. Since the hearing in the last-mentioned district, no papers of any description connected with the motion had been filed. On the hearing before Judge Henry, March 5th, an order was made discharging the attachment. From this order plaintiffs appeal.

Kinsley & Knowles, and M. J. Liddell, for Appellants.

A motion for the discharge of the attachment was filed by respondents on the ninth day of January, 1890. On the fifteenth day of January the respondent Lewis applied to the court to discharge the said attachment, and on the sixteenth day of January the court overruled said application and motion. January 9th respondents filed a motion for a change of venue, which was granted on January 17th. March 5th, forty-three days after the last day for respondents to answer, and fifty-four days after both respondents had answered, and when the said cause had been removed from the court in which the action was begun, and when the cause was pending before another judge other than the one who overruled the first application, respondents made a second application for the discharge of said attachment, which said last-mentioned judge granted said application. By the provision of section 200, chapter lv., first division, Code of Civil Procedure, the respondents exhausted their right to apply for a discharge of this attachment in the court where this action was brought. (*Vaughn v. Dawes*, 7 Mont. 360; *Magee v. Fogarty*, 6 Mont. 237; *Drake on Attachments*, §§ 112, 420; *Hatry v. Shuman*, 13 Mo. 547; *Cannon v. McManus*, 17 Mo. 345; *McDonald v. Fist*, 60 Mo. 172; *Roberts v. Warren*, 3 Wis. 646; *Blackwood v. Jones*, 27 Wis. 498; *Fairfield v. Madison Manuf. Co.* 38 Wis. 346; *Bishop Bros. v. Fennerty*, 46 Miss. 570; *Archer v. Claflin*, 31 Ill. 306.)

Luce & Luce, for Respondents.

Appellants say that on the sixteenth day of January, 1890, the court overruled defendants' motion to discharge the attachment. This is the order referred to: "That said motion be overruled without prejudice to defendants renewing said motion if a change of venue shall be granted herein." This order left the case just as it was before the order was made. The order did not finally dispose of the motion so as to make it appealable. Appellants are mistaken in saying that a second application to discharge their attachment was made March 5th. The only motion or application that was ever filed is the one that was filed in the First Judicial District Court, and it was filed before the time for answering had expired. The summons was served on defendant Lewis, December 2, 1889, in Gallatin County; on

defendant Vaughn, December 12, 1889, in Gallatin County, and the said motion was filed January 9, 1890. The court takes judicial notice that Gallatin County is not in the First Judicial District, and that therefore defendants had forty days after service of summons within which to answer, and it does not require a very careful mathematical calculation to show that January 9, 1890, was within forty days after December 2, 1889. This motion is the only motion ever filed to discharge the attachment in this case, and it is quite immaterial that Judge Henry's order was made forty-three days or fifty-four days after the time for answer had expired. The material questions in this regard are, did Judge Hunt finally dispose of the matter, and did the defendants renew or call up again the motion after the change of venue was made? A casual reading of Judge Hunt's order shows that no final disposition of the motion was thereby made. If we are right in this, then his order of January 16, 1890, did not put an end to the motion in that court and his order was not appealable, and that if his order did not so put an end to the motion, then on transfer to Gallatin County the District Court of that county had jurisdiction to finally dispose of the matter. It therefore follows that *Vaughn v. Dawes*, 7 Mont. 361, cited by appellants, has no application whatever. The grand fact in that case was that the motion to discharge was made after the time prescribed for answering had expired. The points decided in the balance of the cases cited by appellants are, that any proceeding in the nature of a motion to vacate, quash, or discharge a writ of attachment should be taken in time. There is no such question in this appeal. The transcript shows that the defendants, before the time for answering had expired, made their motion to discharge the attachment, and that it was made upon due notice to the plaintiffs.

DE WITT, J.—Section 200 of the Code of Civil Procedure is as follows: "The defendant may also, at any time before the time for answering expires, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or the judge thereof, that the attachment be discharged on the ground that the writ was improperly issued." This statute is interpreted that the time in which the application

must be made "refers to the time in which the defendant shall appear and answer the summons." (*Vaughn v. Dawes*, 7 Mont. 362.) That is, if the summons be served on defendant in a district other than the one in which the action is brought, he must appear within forty days. Defendant Lewis might then make the application before or on January 11th. Defendant Vaughn had until January 21st.

The application was heard by Judge Hunt, January 15th. This was within the statutory time as to defendant Vaughn, whatever may have been the situation of Lewis. When Judge Hunt denied the application, "without prejudice" as to a renewal before Judge Henry, he did not purport to extend the time in which defendants might make the application, which time was fixed by the statute, and the construction thereof in *Vaughn v. Dawes*, *supra*. The ruling simply relieved the defendants from the possibility of a charge of contempt of court in making a second application to another judge. Conceding that the effect of the words "without prejudice" was to leave the defendants as they were before the hearing before Judge Hunt, it was to preserve their privileges existing when they went into the First District Court, not to enlarge them, or create new ones. (See *Ford v. Doyle*, 44 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 285; *Kenney v. Kelleher*, 63 Cal. 443; §§ 551, 552, Code Civ. Proc.) In this view the defendants were therefore, on January 17th, in the same position as if they had never moved for a dissolution of the attachment. We find that they take no steps whatever until the application to Judge Henry, March 5th.

Our statute, section 482, Code of Civil Procedure, defines a motion as follows: "Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion." The statute of California is identical. (Prac. Act Cal. § 515; Code Civ. Proc. Cal. § 1003. See, also, *Jenkins v. Frink*, 27 Cal. 339.) In *People v. Ah Sam*, 41 Cal. 650, Temple, J., interprets the above law as follows: "A motion is properly an application for a rule or order, made *viva voce* to a court or judge. It is distinguished from the more formal applications for relief by petition or complaint. The grounds of the motion are often

required to be stated in writing, and filed. In practice, the form of the application itself is often reduced to writing, and filed. But making out and filing the application itself is not to make the motion. If nothing more were done, it would not be error in the court to entirely ignore the proceeding. The attention of the court must be called to it. The court must be moved to grant the order."

We adopt these views with the modification that we do not consider that the learned judge used the words *viva voce* in their exact literal signification. The application might be submitted to the court without argument or comment; but the attention of the court must be called to it in some way, by some movement of counsel. As the opinion cited says, "the grounds of the motion are often required to be stated in writing, and filed." Without express direction, such is infinitely the better practice. The motion is thus preserved in the exact form which counsel desire to give it. It is then exempt from the dangers incident to journal entries and minutes, or even the transcription by stenographers and court clerks. But the motion itself is the application to the court. "The court must be moved to grant the order;" and, when so moved, the proceeding is a motion. In this view, the defendants' motion, in the case at bar, their application to the court for the order to discharge the attachment, was not made until March 5th. The latest date within which they could move was January 21st. They were too late. This rule is particularly applicable to motions to discharge attachments. The adjudicated cases uniformly hold that such motion should be made *in limine*. Our own statute, which is chary in granting powers to a judge in chambers, gives him authority to hear and determine this motion; presumably for the reason that it is a matter demanding instant decision, and not a delay until term time, which, under the judicial system in force in the Territory when the law was enacted, might be six months distant. Large amounts of personal property may be seized on attachment, and held at a constantly accumulating expense. The right to the attachment should be determined at once. The moving party may not file his motion in writing, and wait for months before moving the court. Such practice would open the gate to abuses incalculable.

It is not required to discuss the other matters presented on the appeal. The motion to discharge, on which the order was made, and from which the appeal is taken, was not made in time, and the order is reversed, with costs.

BLAKE, C. J., and HARWOOD, J., concur.

HEARDT ET AL.. RESPONDENTS, v. McALLISTER, APPELLANT.

JUDGMENT BY DEFAULT—*Motion to set aside—Due diligence.*—On a motion to open a default and set aside a judgment, it appeared that defendant was living at a remote place, fifty miles from the county seat, with his family temporarily sheltered in a tent; that he made a journey of thirty-two miles to place the matter of his defense in the hands of one B., his business associate, who immediately, and eight days before the defendant's time for answering expired, employed counsel, who prepared an answer containing an absolute defense on the merits; that at this time B. was laboring under financial troubles which caused him to forget defendant's business until the last day, when he verified the answer, which was promptly mailed to the clerk of the court, and filed on the evening of the day on which defendant's default was taken, and two days after his time for answering had expired. *Held*, that sufficient diligence was shown to entitle the defendant to be relieved from a judgment by default. (Cases of *Lowell v. Ames*, 6 Mont. 189; *Whit-sile v. Logan*, 7 Mont. 373; *Donnelly v. Clark*, 6 Mont. 136; *Briscoe v. McCaffery*, 8 Mont. 336; *Benedict v. Spendiff*, ante, p. 85, cited.)

Appeal from Fifth Judicial District, Jefferson County.

Defendant's motion to set aside the judgment was denied by GALBRAITH, J.

Statement of facts, prepared by the judge who delivered the opinion.

On August 29, 1889, the complaint was filed. The summons issued thereon was served on defendant in the county where the action was commenced August 31st. His time to answer expired September 10th. No appearance was made by defendant on that day, and on September 12th, at the opening of court in the morning, his default was duly entered for want of an appearance. On the evening of that day, after the default was entered, the clerk of the court received by mail a duly-verified answer of the

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31*	505

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9	405
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defendant, which he retained and marked "filed" in the case. On January 13, 1890, on motion of plaintiffs, the court struck this answer from the files of the court. On January 14th the plaintiffs made some formal proofs to the court, and entered judgment against the defendant. January 27th, the defendant moved the court to set aside the judgment, open the default, and allow him to answer on the merits. The motion was supported by the presentation of the answer which he had formerly sent to the clerk, and by his affidavit. The answer thus presented is a complete and specific denial of the material allegations of the complaint, and sets forth a defense on the merits to the cause of action set up in the complaint. It is verified, and meets all the requirements of an affidavit of merits. In other words, if the matters set up in the answer are true, they are an absolute defense on the merits. A portion of the matter in the answer is confirmed by an affidavit of three persons purporting to be familiar with the facts.

The affidavit of defendant personally reiterates some of the matters of defense set forth in the answer, and refers to said answer. The affidavit then sets forth the following facts, which the defendant urges as showing his diligence in endeavoring to get his appearance into court: At the time when summons was served on him he was living at Homestake Gulch, fifty miles from the town of Boulder, the county seat of Jefferson County, in which the action was commenced, and sixteen miles from the city of Butte; that he was preparing to engage in cutting cord-wood, and had his family temporarily lodged in a tent; that with due regard to the safety and health of his family he could not make the overland trip to Boulder; that one James Brown, of the city of Butte, was interested in the cord-wood business with defendant, and was a man of personal integrity and prompt business habits; that defendant went to Butte and delivered to Brown copies of the papers served on him the second day of September, and arranged with Brown to procure counsel, and attend to the defense of the action; that Brown engaged the services of counsel in Butte, who prepared an answer in ample time for the same to be forwarded to Boulder for filing; that at this time Brown was laboring under great financial and business troubles of his own, and owing to his disturbed state of mind thereby, he did not go to the office of counsel to verify the answer until September 10th,

the last day for appearing; that the answer, as appears by the verification itself, was sworn to on that day; that counsel then on said day mailed the same to the clerk of the court at Boulder, inclosing the clerk's fees due him for filing the answer; that the answer so mailed did not reach its destination until the 12th; that defendant did not know that he was in default until after judgment was rendered against him. The plaintiffs filed nothing in reply to this showing, and on the same, the court denied the motion to open the default on the twenty-seventh day of February. From this order the defendant appeals.

McBride & Haldorn, for Appellant.

Cowen & Parker, for Respondents.

DE WITT, J.—The filing of the answer, September 12th, was after the defendant's default had been duly taken in open court. Such filing was a nullity. The answer is before us, however, for another purpose, that is, as an exhibition of defendant's alleged meritorious defense. As such, it meets every requirement. An answer could not well have been framed, the matter in which, if true, would be a more thorough defense on the merits.

The motion to set aside the judgment was made in time. (§ 116, Code Civ. Proc.)

The only other consideration is whether defendant is entitled to relief from the judgment by reason of his mistake, inadvertence, surprise, or excusable neglect. (§ 116, Code Civ. Proc.)

The matters set up in defendant's motion are undenied, and are taken by this court as true. The defendant was living at a remote place, fifty miles from the county seat. His family were temporarily sheltered in a tent, at the approach of winter.

He made a journey of thirty-two miles to Butte, and placed the matter of his defense in the hands of a business associate and responsible person, one James Brown. This was eight days before his answering time expired. Brown employed able counsel who prepared an answer at once. Personal disasters of a serious nature caused Brown to forget the business of defendant until the last day, September 10th. He then verified the answer, which was promptly mailed to the clerk of the court.

If a defendant, situated as this one was, and displaying the

diligence that he did, cannot be relieved from a judgment by default, against which judgment he has a perfect defense, it is difficult to conceive of a case in which a court would grant the relief. We cite the following cases in this court upon the subject generally: *Lowell v. Ames*, 6 Mont. 189; *Whiteside v. Logan*, 7 Mont. 373; *Donnelly v. Clark*, 6 Mont. 136; *Briscoe v. McCaffery*, 8 Mont. 336; *Benedict v. Spendiff*, ante, p. 85. The order is reversed with costs, with the direction to the District Court to set aside the judgment and allow defendant to answer.

BLAKE, C. J., and HARWOOD, J., concur.

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GANS ET AL., RESPONDENTS, v. SWITZER ET AL., APPELLANTS.

CORPORATION—Liability of trustees—Penal statutes.—Section 400, chapter xxv., fifth division of the Compiled Statutes, making the trustees of a corporation, organized under the provision of said chapter, jointly and severally liable upon a failure to file an annual report for all debts of the company then existing, and for all that shall be contracted before such report shall be made, though a penal statute and requiring a strict construction, cannot be so construed as to excuse such trustees from liability for debts contracted prior to a default.

CORPORATIONS—Defense—Dissolution—Annual report.—In an action against the trustees of a corporation to charge them with individual liability for failure to file an annual report, it was alleged in defense that before the time for filing such report the corporation was insolvent and had entirely abandoned its business; that all its property belonged to one of its trustees, having been delivered to him in satisfaction of an indebtedness; and that for a period of two months no officer or trustee had exercised any corporate act or function, and that there was no intention to resume the business of said corporation. *Held*, that the acts set forth did not dissolve the corporation and constituted no defense to the action.

SAME—Dissolution.—The laws of this State relating to corporations contemplate that the corporate existence of a corporation organized thereunder shall continue until disincorporated by order of the court, or dissolved by limitation, or until its franchise be forfeited for cause through judicial proceedings, and such corporations are not dissolved by abandonment or non-user of their franchises.

Appeal from First Judicial District, Lewis and Clarke County.

Plaintiff's motion for judgment on the pleadings was granted by HUNT, J.

Casey & Smith, and Fletcher Maddox, for Appellants.

It is apparent from the answer that in September, 1889,

the corporation, of which the appellants were trustees, had practically abandoned all functions of the corporation, all its operations had proved a failure, it was unable to manufacture any brick; that it had entirely abandoned its business, and that the same was practically suspended, its means were exhausted, and its property and machinery had been turned over to Jacob Switzer in satisfaction of debts of the corporation to said Switzer, which the corporation were unable to pay, and that thereafter no officers or trustees of said company exercised any corporate act or function to resume its business, and said Switzer purchased all property of said company, and the same belongs to him irrevocably, and for these reasons the trustees of said corporation were not required to file any annual report. We submit that this answer states a good defense to the action. (Wait on Insolvent Corporations, § 585; *Bruce v. Platt*, 80 N. Y. 379, and cases cited; *Bradt v. Benedict*, 17 N. Y. 93; *Slee v. Bloom*, 19 Johns. 456, 477; *Slee v. Bloom*, 20 Johns. 669; *Penniman v. Briggs*, Hopk. Ch. 300; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Huguenot Bank v. Studwell*, 74 N. Y. 621; *Losee v. Bullurd*, 79 N. Y. 404.)

F. N. & S. H. McIntire, for Respondents.

When a corporation is once formed, the trustees are liable for neglect of duty until a final dissolution. Mere insolvency, ceasing to do business, or sale of its property does not dissolve the corporation, or relieve trustees from liability for neglect of duty. (*Sanborn v. Lefferts*, 58 N. Y. 179; *Chamberlin v. Huguenot Manuf. Co.* 118 Mass. 532; *First Nat. Bank v. Hingham Manuf. Co.* 127 Mass. 563; *Hill v. Fogg*, 41 Mo. 563; *Carey v. Schoharie M. Co.* 2 Hun, 110.) The ownership of property is not essential to the existence of a corporation. (*Sullivan v. Triunfo Min. Co.* 39 Cal. 468.) This corporation was legally in existence in September, 1889, and failure to file the report is inexcusable. There are two ways of dissolving a corporation in Montana, by neither of which had the Helena Pressed Brick Company been dissolved: (1) Compiled Statutes, page 740, section 488. (2) By limitation. The answer presented no defense to the action. The rule is universal and well

settled that the dissolution of a corporation, or forfeiture thereof, cannot be alleged in a collateral proceeding. An individual who may be sued upon his dealings with a corporation, a stockholder sued on his subscription, or a trustee on his statutory liability, has no standing which enables him to defend the suit, on the ground that the corporation has lost its powers. (*Dyer v. Walker*, 40 Pa. St. 157; *Baker v. Backus, Adm'r*, 32 Ill. 79; *Sewall's F. Bridge v. Fisk*, 23 N. H. 171; *Pearce v. Olney*, 20 Conn. 544; *Johnson v. Bentley*, 16 Ohio, 97; *Stoops v. Greensburgh & B. P. Co.* 10 Ind. 47; *State Bank v. Merch. Bank*, 10 Mo. 123; *Cahill v. Kalamazoo Ins. Co.* 2 Doug. [Mich.] 124.) Even after a corporation is legally dissolved the trustees have certain duties to perform that we have never heard that the trustees of this corporation made any pretense of doing. (Comp. Stats. p. 740, § 489.)

BLAKE, C. J.—This appeal has been taken from the judgment of the court below, which was entered upon the pleadings. The complaint alleges, in substance, that the Helena Pressed Brick Company was a corporation, which had been organized under the laws of the Territory of Montana, and had its principal place of business in Helena, and was doing business in the counties of Lewis and Clarke and Jefferson; that Switzer *et al.*, the defendants, were at all times the trustees of the corporation, and discharged the duties of the office; that the corporation was indebted June 12 and 21, 1889, at said Helena, to various persons, in certain sums, which are enumerated, and the plaintiffs by purchase acquired these claims; that said accounts have not been paid.

“And the plaintiffs further say that the said corporation, the Helena Pressed Brick Company, did not, within twenty days from the first day of September, 1889, make, and have not, at any time since said date, made, a report stating the amount of its capital stock and of the proportion of the same actually paid in, and the amount of the existing debts of the said company at the period last aforesaid, or at any period subsequent thereto; nor did said company cause any such report to be signed by its president, and a majority of its trustees, nor to be verified by the oath of its president, nor by the oath of its secretary, nor to be

filed in the offices of the recorder of Lewis and Clarke and Jefferson counties, nor to be published in any newspaper printed and published in either of said counties; and the said defendants, and also said company, wholly neglected and refused, during said period of twenty days, from September 1, 1889, and have ever since neglected and refused, to cause such report to be made, signed, and verified, filed, printed, and published in conformity with the provisions of section 460, fifth division, page 728 of the Compiled Statutes of Montana Territory, and they, the said company, and the said defendants, as such trustees, have at all times neglected and refused, and still do neglect and refuse, to comply with the provisions of the said statute."

The answer denies "that, at the times mentioned in plaintiff's complaint, the Helena Pressed Brick Company was a corporation existing or doing business under or by virtue of the laws of Montana Territory, having its principal place of business in the city of Helena, Lewis and Clarke County, Montana Territory, or any other place, or that it had any place of business at all, or that it was doing business in Lewis and Clarke County and Jefferson County, or any other place."

The answer alleges "that on or about July 13, 1888, the said the Helena Pressed Brick Company was duly incorporated under the laws of Montana Territory, and commenced doing business in the counties of Lewis and Clarke and Jefferson, in said Territory; (2) that on about December 14, 1888, the said corporation was solvent, and that thereafter said corporation was at no time solvent; (3) that in the month of April, Jacob Switzer, Albert Kleinschmidt, Fletcher Maddox, Frank L. Sizer, and G. U. Hallett, were trustees of said corporation; (4) that at said time, namely, in the month of April, 1889, the said the Helena Pressed Brick Company were involved in large pecuniary losses and liabilities, and were unable to pay its debts; that the enterprise of manufacturing brick at their yards had proved an entire and hopeless failure, and the company was at such time hopelessly insolvent; that at said time, July 15, 1889, said company executed a note and mortgage to Jacob Switzer for \$11,192.05, due by it to him. . . . Its means at said date of carrying on business were exhausted, and it had turned over to said Jacob Switzer all its property and machin-

ery, so that he might, by some possible means, work out from its property and the conducting of the same some portion of the amount due him. At this time the corporation was entirely abandoned, and all profits or losses of the company in its business were at the profit or loss of said Jacob Switzer, and no one else. That thereafter no officers or trustees of said company exercised any corporate act or function in the business of said corporation, and thereafter manifested no intention to resume business thereof, but abandoned same entirely, and said Switzer purchased all property of said company thereafter, and the same belongs to him irrevocably."

The complaint was filed September 24, 1889, and prayed for judgment for said sums against the said trustees, the appellants herein. No replication was made to the answer.

The section of the statute which is referred to in the complaint is as follows: "Sec. 460. Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the town, city, or village, or if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee, or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if, within the time herein mentioned, said trustee, or board of trustees, or company, shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation." (Comp. Stats. div. 5.)

The complaint states facts which are sufficient to establish the obligation under the statute of the trustees of the Helena Pressed Brick Company to pay its indebtedness. Does the answer plead a defense which shields the appellants from this liability? The question is presented to this court for the first time, and the vast number and manifold character of the corporations within the State, and the conflict in the decisions upon some of the propositions which are relevant to the inquiry, demand a careful review of the authorities.

It is the general rule that this law is penal, and must be construed strictly. (*Providence Steam Engine Co. v. Hubbard*, 101 U. S. 191; *Chase v. Curtis*, 113 U. S. 457.) Mr. Morawetz, in his valuable treatise on Private Corporations, considers the subject, and makes the following appropriate comments: "It is not always quite clear what the courts mean to express by saying that statutes of this character are 'penal'; and that they impose upon the directors a 'penal liability.' . . . Nor is the liability of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law; it is not a penalty or fine imposed by the State for the infraction of a public law. . . . The statutes imposing this liability establish a new rule of private right, a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called 'penal' appears to be that it does not exist at common law, and is neither created by contract, nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company." (Vol. 2 [2d ed.], § 908.) Even with this understanding, "in construing penal statutes, we must not, by refining, defeat the obvious intent of the legislature." (Potter's *Dwarris on Statutes*, 247.) The law before us is clothed in clear and concise terms, and we think that the same end will be attained by the application of any canon of interpretation. There should be no difficulty in carrying out "the true intent and meaning of the legislative assembly." Under certain conditions the statute, in effect, declares that the trustees of the Helena Pressed Brick Company "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

There are no exceptions in this clause, and there does not appear to be any obscurity in the scope of the liability of the trustees, if the words "shall be understood and construed according to the approved and common usage of the language." (Comp. Stats. div. 5, § 202.)

There has been no change in the board of trustees of the Helena Pressed Brick Company since its organization. The appellants were its officers when the debts mentioned in the pleadings were contracted, and did not publish or file the annual report in 1889, or comply in any manner with the requirements of the statute *supra*. It was adjudged in *Steam Engine Co. v. Hubbard, supra*, that the liability of the president of a corporation does not extend to debts which were contracted before the period when he neglected or refused to make the certificate authorized by law, and remained unpaid. This deduction followed the phraseology of the statute of the State of Connecticut, which was decisive of the case, and provides that this officer shall be liable by reason of his default "for all debts of such corporation contracted during the period of such neglect or refusal." In this respect, the laws of the State of New York are like the section *supra*, and Mr. Justice Clifford, in the opinion, in *Steam Engine Co. v. Hubbard, supra*, says: "Marked differences exist between the provisions of the New York statute and those of the State of Connecticut, the latter being much less stringent than the former. By the New York law, the duty of making the annual return is required of the corporation itself, and the penalty for neglect is imposed upon the trustees who are intrusted with the management of its affairs. Consequently, it is a corporate duty, and being such, each succeeding board is bound to perform it if it has been neglected by their predecessors. Unlike that, the duty to deposit the certificate under the Connecticut statute is devolved on the president and secretary in terms which show that a new president does not inherit the consequences of neglect of duty or pecuniary liability from his predecessor in office. He is made liable for his own neglect and not for that of a prior officer, as clearly appears from the closing sentence of the penal section. In New York the trustees, upon default, are made liable for all the outstanding debts of the corporation, whenever contracted; but in Connecticut the

president and secretary are liable only for debts contracted during the period of such neglect or refusal." In *Miller v. White*, 50 N. Y. 139, this statute was construed by Mr. Justice Peckham, who said: "It is absolute that the trustees shall be liable for all the debts of the company, if the report be not made, no matter by whose default. If one of the trustees did all in his power to have it made, yet if the president, or a sufficient number of his co-trustees to constitute a majority, declined to sign it, or if the president and secretary declined to verify it by oath, the faithful trustee seems to be absolutely liable, as well as those who refuse to do their duty." (See, also, *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Knox v. Baldwin*, 80 N. Y. 610.) Some expressions may be found in the cases which discuss the effect of the resignation of a trustee upon his official acts, that appear to qualify this interpretation of the statute, which defines the liability for the payment of the indebtedness of the corporation. But, as we have seen, the trustees of the Helena Pressed Brick Company did not resign, and no questions of this nature arise upon this hearing. We readily accept the legal principles which have been laid down, and hold that they reiterate the plain intent of the law regarding the responsibility of the officers of this corporation.

The main ground of the defense, which is set forth in the answer, has been the salient point of dissension. It is insisted that the Helena Pressed Brick Company, in September, 1889, had practically abandoned its functions; that its operations in manufacturing brick had resulted in financial disasters; that the business had been abandoned; that its means had been exhausted, and all the property had been delivered to Switzer in satisfaction of debts which could not be paid, and that the same belonged to him irrevocably; that since July, 1889, no officer of the corporation had discharged any duty; and that, under these circumstances, the trustees were not obliged to file or publish the annual report in 1889.

The authorities of the State of New York have repeatedly asserted the soundness of this position. The leading case of *Bruce v. Platt*, 80 N. Y. 379, reviews the cases which have been decided in her courts, and demonstrates that this doctrine, which was maintained in 1822, in *Slee v. Bloom*, 19 Johns. 456,

has been consistently upheld therein. The reasons which underlie these decisions are succinctly given in *Kirkland v. Kille*, 99 N. Y. 395, by Mr. Justice Danforth, who approves *Bruce v. Platt, supra*, and says: "When the condition of the company is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in that section. In other words, when these events happen it ceases to be a company 'carrying on business,' and the direction of the statute has no application."

The liability of the appellants is a consequence of the failure or omission to discharge a trust enjoined by law. Their authority, and the formation and perpetuation of the Helena Pressed Brick Company, depend upon the statute of the State. The legislation relating to corporations contemplates that these bodies shall use and enjoy their privileges until their existence is legally terminated. They can be disincorporated by the order of the District Court, upon the hearing of a petition which has been duly presented. (Comp. Stats. div. 5, § 488.) They can be dissolved by the limitation of their term in the articles of incorporation. Their franchises can be forfeited for various causes through judicial proceedings. (*Territory v. Virginia Road Co.* 2 Mont. 96.) In the eyes of the statute, however, the rights of the trustees continue after these events, and they are expressly empowered "at the time of dissolution" to be the active officers of the corporation for many purposes, which are defined. (Comp. Stats. div. 5, § 489.)

The acts which are specified in the answer did not dissolve the Helena Pressed Brick Company, or extinguish its charter, or remove from office the trustees. Chancellor Kent writes: "But the old and well-established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved by reason of any misuser or non-user of its franchises, until the default has been judicially ascertained and declared." (2 Kent Com. 312.) In *De Camp v. Alward*, 52 Ind. 473, Mr. Chief Justice Downey says, in the opinion: "We do not regard the act of the corporation in assigning its property to a trustee for the payment of the debts of the corporation, etc., as a sur-

render of its franchises as a corporation, and as working a dissolution of the corporation. A corporation may cease to do business, sell or assign its property for the payment of its debts, etc., and yet not cease to be a corporation." In *Rollins v. Clay*, 33 Me. 137, the court observes that "a corporation is not dissolved by ceasing to exercise its powers; nor because its stockholders and directors may consider it to be 'defunct.'" In *Reichwald v. Commercial Hotel Co.* 106 Ill. 451, Mr. Justice Sheldon says, in the opinion: "The effect of this transfer of all the hotel property no doubt was to terminate the business of the corporation; but that was not the necessary effect. It is entirely clear, upon the authorities, that the disposal of all the property of a corporation has not the effect to end or dissolve the corporation." (See, also, *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *Buell v. Buckingham*, 16 Iowa, 296; *Moseby v. Burrow*, 52 Tex. 403; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 288; *New Jersey Zinc Co. v. New Jersey Franklinite Co.* 13 N. J. Eq. 335; *Sullivan v. Triunfo Min. Co.* 39 Cal. 468.)

Mr. Chief Justice Shaw held, in *Coburn v. Boston P. M. & M. Co.* 10 Gray, 243, that a corporation was not extinguished by proceedings in insolvency, and concluded with the remark that, "if the legislature had so intended, they would have so declared." This rule is applicable to the statute under investigation. It has been shown that the Helena Pressed Brick Company is a valid corporation, and in the full enjoyment of all the powers it originally possessed, notwithstanding the facts which are contained in the answer. So long as this condition is not disturbed, the trustees are entitled to control its affairs, and the appellants cannot escape the responsibility which the legislature has created for their defaults.

The phrase, "where the business of the company is carried on," which forms the corner stone of the decisions of the courts of the State of New York, *supra*, is found in several sections of the chapter concerning corporations. The certificate of incorporation shall state "the county in which the operations of said company shall be carried on." (§ 446.) "Any certificate . . . may designate one or more places where the company may carry on their business in the Territory of Montana." (§ 448.) Another certificate shall be recorded in the county "wherein the

business of said company is carried on." (§ 459.) Provision is made for the removal of the principal place of business into some other county. (§ 490.) In *Ex parte Schollenberger*, 96 U. S. 377, Mr. Chief Justice Waite says: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter." The last sentence of the section under consideration specifies "the county in which the business of the said company is carried on, as declared in its certificate of incorporation." This construction, which has been given by the legislature, applies to these expressions, which refer to the "legal home" of the corporation.

When corporations are dissolved in any of the modes which have been pointed out, the evidence will consist of records which are open to public inspection, and no creditor or shareholder can be injured through ignorance of their financial standing. But if testimony is essential to prove abandonment, or any fact that is a matter of intention in the mind of the trustees, or any other persons, the difficulties in the path of the holders of accounts against corporations in default are increased. Proof of the neglect of the trustees to publish or file the annual reports in September can be easily overcome by the statements of the culpable parties that they had abandoned the enterprise in August of the same year. Uncertainty of this degree can be prevented by a rigid adherence to these views. The benefits of the statute regulating corporations are inseparable from the penalties which are prescribed, and all officers who undertake the performance of its obligations will be compelled to render obedience.

The judgment is affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

STEDMAN, RESPONDENT, v. SWITZER ET AL., APPELLANTS.

See syllabus and opinion in the case of *Gans et al. v. Switzer et al.*, ante, page 460.

Appeal from First Judicial District, Lewis and Clarke County.

Plaintiff's motion for judgment on the pleadings was granted by HUNT, J.

Casey & Smith, and Fletcher Maddox, for Appellants.

Wade, Toole & Wallace, for Respondent.

BLAKE, C. J.—All the questions arising in this case have been passed upon in *Gans v. Switzer, ante* (just decided), and for the reasons therein stated it is hereby ordered that the judgment be affirmed, with costs.

HARWOOD, J., and DE WITT, J., concur.

MONTANA UNION RAILWAY COMPANY, APPELLANT, v. LANGLOIS ET AL., RESPONDENTS.

RAILROADS—Depot privileges—Public policy—Constitutional law.—A railroad company may not grant to one person the exclusive right to the use of a portion of its depot platform to deliver passengers departing, and to receive and solicit the patronage of incoming passengers, to the exclusion of all other persons from the exercise of such rights, as such grant is against public policy and contrary to the provisions of article xv., section 7 of the Constitution, which provides that "no discrimination in charges, or facilities for transportation of freight or passengers of the same class, shall be made by any railroad, or transportation or express company, between persons or places within this State."

SAME—Common carriers—Rights of passengers.—Passengers arriving at or departing from the station of a common carrier are entitled to equal convenience and opportunity to approach said station or depart therefrom, and in so doing are entitled to whatever benefit of competition may grow out of the contests of others to supply the public demands and receive the compensation therefor.

SAME—Common carriers—Exclusive privileges—Rules governing use of depot.—A rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity and not discrimination, and the grant by a railroad company of a platform privilege at its depot to one hackman to the exclusion of all others is therefore not such a rule or regulation as applied to the right of a common carrier to make and enforce all reasonable rules and regulations necessary to govern persons coming to its station buildings, platform, and grounds.

Appeal from Second Judicial District, Silver Bow County.

The cause was tried before DE WOLFE, J.

M. L. Wines, for Appellant.

The plaintiff contends that it is the owner in fee of its grounds and platforms; that it may regulate the use of the platform as it desires, provided the traveling public are not inconvenienced; that it may, if it wishes, engage in carrying passengers by hacks to and from its trains; that if it was so engaged in such business, it would have the right to its own property for such purposes; that if it has such right, it can as well employ Lavells with twenty hacks to do such service, as to employ or buy the twenty hacks itself, and run them; that if plaintiff has the right to its platform, it has the right to sell that right to Lavells, especially for a valuable consideration, which valuable consideration redounds to the benefit of plaintiff's passengers, the public. The proposition simply is, may the railroad company sell this right for a valuable consideration, and be protected in such sale, and the benefits accruing to it thereby? The station grounds are the private property of the company. (Comp. Laws, § 692, p. 816; *Barker v. Midland Ry. Co.* 18 Com. B. 46; *Hall v. Power*, 12 Met. 482; *Harris v. Stevens*, 31 Vt. 79; *Gillis v. Pennsylvania R. R. Co.* 59 Pa. St. 129; *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500.) The railroad company may make all reasonable regulations for the management of its grounds, the same as natural persons. (*Commonw. v. Power*, 7 Met. 596; *Hall v. Power*, 12 Met. 482; 1 American Railway Cases, 389; 36 Eng. L. & Eq. 253; 40 Eng. L. & Eq. 250.) Any one on the grounds of the railroad company, and not there for the purpose of coming or going on the train, though perhaps not a trespasser, may, after request, be ejected. (*Johnson v. C. R. I. & P. R. Co.* 51 Iowa, 25.) It is not unlawful, nor against public policy, for a railroad company to carry passengers by stage to and from one of its stations and an adjacent village, in connection with and as a part of its business of transporting passengers upon its road. (*Buffit v. Troy & Boston R. R. Co.* 36 Barb. 420.) Railroad company may carry on express business on its road to the exclusion of all others. (*Sargent v. Boston & Lowell R. R. Co.* 115 Mass. 416; *Vandall v. South San Francisco Dock Co.* 40 Cal. 83.) And, for a consideration, it may give this right to enter to one,

and exclude all others. (*Beadell v. Eastern Counties Ry. Co.* 2 Com. B. N. S. 509.) The railroad company may exclude hackmen and others, not there for the purpose of taking passage on the train. (*Johnson v. C. R. I. & P. R. Co.* 51 Iowa, 25; *Barker v. Midland Ry. Co.* 18 Com. B. 45; 36 Eng. L. & Eq. 253.) Hackmen have no right in the station grounds, and may be excluded. (*Landrigan v. State*, 31 Ark. 50; *Barker v. Midland Ry. Co.* 18 Com. B. 45; *McKone v. Michigan Cent. R. R. Co.* 51 Mich. 601; Patterson's Railway Accident Law, 219.) "No inconvenience to the public being shown, a railroad company will not be enjoined at the suit of a hackman to admit him;" and, of course, an injunction should be granted to the company to exclude such hackman. (*Beadell v. Eastern Counties Ry. Co.* 2 Com. B. N. S. 509; *Painter v. London B. & S. C. Ry. Co.* 2 Com. B. N. S. 72; *Barker v. Midland Ry. Co.* 18 Com. B. 45; *Marriott v. London & S. W. Ry. Co.* 1 Com. B. N. S. 499.) In the case last cited the hack driver was admitted to the yard, but the decision goes upon the ground of *public convenience*, and the decision rests expressly upon the inconvenience inflicted upon the public, not upon the particular grievance to the applicant, the driver. In *Painter v. London B. & S. C. Ry. Co.* 2 Com. B. N. S. 72, a railway company granted exclusive permission to a limited number of fly proprietors to ply for hire within their station. Injunction was refused against the company, at the instance of a fly proprietor excluded, although it was sworn to by plaintiff and others that occasional delay and inconvenience resulted to the public from the course pursued. Williams, J., says: "The complaint must come from those who use the railway and show a public inconvenience." In *Barker v. Midland Ry. Co.* 18 Com. B. 45, an omnibus proprietor, who carries passengers and their luggage for hire to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station yard. An "undue preference" can only be established when they show that there is no such want of space as to warrant it, and this must be shown in connection with a *public inconvenience*. (*Marriott v. London & S. W. Ry. Co.* *supra.*) The above cases are directly in line with the position of the appellant. Respondent contends that we are creating a monopoly.

Such is not the situation. We are making no "undue preference." The expression "undue preference" in the English statute, as well as in the general law of this country, has no reference to extra privileges granted to certain ones of independent business from the railroad company (as hack drivers, in this case), but refers only to favors and preferences shown to those who are actually dealing with them, and shown in relation to the doing of what the corporation is expressly created to do. The railroad company is created to carry passengers and freight, and, in the doing of this, it partakes of the nature of a public servant, but it is not created to foster and provide for those engaged in the innumerable branches of business remotely connected with the railroad, and owes to such persons no duty whatever. The action must come from one of the public, seeking to use the railway for some purpose for which it was created, and in this case there is no pretense but that the Lavell hack service was in every way adequate, and no complaint whatever appears as coming from the public. In short, a railroad company is not created for the purpose of giving employment to hackmen, and if they resort to the station and grounds for their own profit, the company may exclude one, part, or all, and no unlawful or undue preference will exist.

John J. McIlhatton, for Respondents.

The plaintiff contends that it is the owner of its grounds and platforms, and may regulate the use of them. This to a certain extent is true; but the law will not permit undue or unreasonable preference to be given, in the right to be admitted upon such grounds, among those who conduct themselves in an orderly manner, nor will exclusive privileges be allowed to some in plying their business there which are denied to others. Although such grounds and platforms may be private as to ownership, they are not so as to the purposes to which they are appropriated. And while they are used mainly with a view to the convenience of those who travel or transport their goods by the road, still others, against whom no special objections exist, should not be unreasonably or unequally excluded. (Hutchinson on Carriers, p. 424, § 523; 1 Rorer on Railroads, p. 480,

par. 4.) The defendants contend that in common with all citizens of the commonwealth, whose business or avocation is necessarily connected with the business of the plaintiff company, they have the right, at all reasonable and proper times, to go upon the plaintiff's premises, when necessary to the transaction of their business, unless by so doing they in some way obstruct or interfere with said company in the discharge of its legitimate business. We think it cannot be contended that defendants annoyed plaintiff in any way, or that they interfered with its legitimate business. It only appears that they interfered with Lavell Brothers' business, and then only by taking a position with their hacks or carriages at plaintiff's platform when the space thereat was vacant, and not occupied by Lavell Brothers' carriages. This was no interference with plaintiff's business, and not even with Lavell Brothers' business, as defendants had a right thereto. (*Inhabitants of Worcester v. Western R. R. Corp.* 4 Met. 564; *Commonw. v. Power*, 7 Met. 596; *Camblos v. Railroad Co.* 9 Phila. 411.) That the alleged contract of plaintiff with Lavell Brothers is *ultra vires*, see *Summit v. State*, 9 Am. & Eng. Ry. Cas. 302; *Camblos v. Railroad Co.* 9 Phila. 411; and to permit such a disposal would be contrary to public policy. While the plaintiff has the right to make reasonable regulations regarding its platforms and grounds, they must be such as to apply to all alike, without preference or discrimination; and while it might exclude all hackmen from its grounds or platform, or require them to remain a certain distance therefrom, still, if it permits one to exercise the right or privilege of stopping at its platform it must permit all to do so. (*Markham v. Brown*, 8 N. H. 523.) Whatever may be the plaintiff's right to exclude all common carriers of passengers or merchandise from its depot and grounds, it cannot arbitrarily admit to its grounds and platform one common carrier and exclude all others. Such a regulation would not give to all persons the reasonable and equal terms and facilities secured to them by the common law. We submit that the following authorities are against the right of plaintiff to make such a regulation: *Parkinson v. Great Western Ry. Co.* Law R. 6 Com. P. 554; *In re Palmer etc. Ry. Co.* Law R. 6 Com. P. 194; *New England Exp. Co. v. Maine Cent. Ry. Co.* 57 Me. 188; *Marriott v.*

London etc. Ry. Co. 1 Com. B. N. S. 499. One point herein is, can the railroad control and conduct business foreign to the purpose of its organization, outside of its grant or franchise? We think not. If plaintiff is right in its claim, will it not really carry on and control the business of transporting passengers outside of its grounds and between Butte City and the same? We submit that it will. Finally, we contend that plaintiff's claim of right is clearly *ultra vires* and against public policy, and that to allow it to maintain it would not only create a monopoly and injure defendants, but would work a public inconvenience and injury.

HARWOOD, J.—This is an action for an injunction. The complaint sets forth that the appellant is a railway corporation organized under the laws of the Territory of Montana; that it is the owner of, and operating as a common carrier, a line of railroad running from Garrison, in Deer Lodge County, and divers other stations, to its station known as South Butte, in Silver Bow County, Montana, the latter station being about one and one-half miles from the United States postoffice in the city of Butte, in said Silver Bow County; that at the said station of South Butte the appellant is the owner of and in possession of a large number of railway tracks, yards, station grounds, and buildings; that the appellant has at said depot or station building at South Butte a long platform for the accommodation of passengers whom the appellant transports to and from said station, and that said depot grounds are surrounded by a board fence, inside of which hacks and wagons are accustomed to drive for the purpose of conveying passengers to appellant's passenger trains, and receiving passengers from said trains; that at the time stated, and for a long time prior thereto, the appellant had a contract with the government of the United States, whereby the appellant was obliged to carry upon its trains the United States mail matter to said station at South Butte, and thence to the postoffice at the city of Butte; that appellant contracted with Geoffrey and Thomas Lavell, in the name of Lavell Brothers, to carry said United States mail from said station at South Butte to the United States postoffice at Butte City, and appellant further contracted with said Lavell Brothers to have an ample supply of hacks and omnibuses

at said station of South Butte, at the arrival of all trains, for the safe and comfortable transportation of all passengers who desire such transportation from said station of South Butte to the city of Butte and points adjacent thereto. And in consideration thereof the appellant granted and agreed with said Lavell Brothers to give them the exclusive right to drive and stand their hacks, carriages, and omnibuses along the edge of the said platform. That respondents are the owners or drivers of hacks and carriages, and at the times complained of, and against the will and protest of plaintiff, have forcibly driven their hacks and carriages into said depot yard of plaintiff, and driven and stood such hack adjacent to and against the platform aforesaid, and have forcibly kept from such platform the hacks of Lavell Brothers; that plaintiff, by its agents and servants, have often protested to defendants against their conduct in that respect, and repeatedly told defendants that they could not occupy said platform privileges; but that plaintiff did offer defendants the privilege of driving into plaintiff's said depot at said station, and standing their hacks in said yard to deliver and receive passengers, provided the defendants would keep away from the said platform a distance of fifty feet, which place was clearly indicated to the defendants, and further that defendants might have the privilege of driving and standing their hacks and carriages at a point on said platform east of the passenger depot not occupied by the hacks of said Lavell Brothers; that notwithstanding these protests and concessions of plaintiff the defendants continue to drive and stand their hacks next to said platform, and within said fifty-feet limit; and defendants expressly decline to desist from driving and standing their hacks at said forbidden place, and expressly declare that they will persist in placing their hacks at the platform reserved as aforesaid to Lavell Brothers; that if the defendants continue to do these acts complained of, or any of them, the plaintiff will be prevented from carrying out its part of the said contract with Lavell Brothers, and the latter will decline to transport the said United States mail from the station aforesaid, and to the post-office at Butte City, and to care for plaintiff's railway passengers as aforesaid; that plaintiff has not a plain, speedy, and adequate remedy at law.

Upon the facts set forth, the plaintiff prays that the defendants be restrained by injunction from driving or standing hacks, cabs, carriages, or busses at the said platform of plaintiff at the west side of its depot buildings, or within fifty feet thereof.

The defendants answer and admit that defendant, Charles Langlois, is the owner of a line of hacks, vehicles, and carriages, with which he is engaged in carrying passengers in and about the city of Butte, and to and from the station and trains of plaintiff, and that the other defendants named are in his employ as drivers of said hacks, carriages, etc. But the defendants deny that they, or either of them, ever in any manner interfered with the said plaintiff in the conduct of its said railroad or passenger business at South Butte, or elsewhere, or that they, or either of them, interfered with the comfort or convenience of passengers of plaintiff at said station.

The defendants further allege that plaintiff never had any contract with any of its passengers to carry or transport them further than its said station at South Butte, and that plaintiff's contracts for transportation of its passengers to said station ends and is fully executed when such passengers are landed on said platform, and that all such passengers are obliged to procure and pay for their transportation from said platform to the city of Butte, or elsewhere. That the defendants, in their conduct in running their line of hacks and carriages for the transportation of passengers and baggage to and from the said station, have always conducted the same in a quiet and orderly manner, and have not gone upon the platform of plaintiff nor solicited nor annoyed plaintiff's passengers, but have driven their hacks and carriages up to said platform on the west side of said station and stood them there to receive and carry any and all such passengers as might wish to employ them so to do; that they never have at any time interfered, nor attempted to interfere, with the hacks of said Lavell Brothers at said station; that defendants have only driven their hacks up to said platform when there was a vacancy thereat, and had only refused to remove their hacks therefrom to make way for the hacks of said Lavell Brothers.

The defendants further allege that the portion of plaintiff's platform which is west of the said passenger station as described

in plaintiff's complaint is the portion of the platform where passengers alight from plaintiff's trains at said station; that the portion of the said platform east of said station building, which plaintiff alleges it offered to allow defendants to drive their hacks to for the purpose of landing and receiving passengers, is used almost entirely for handling freight and baggage, and the ground alongside thereof is always used by baggage and freight wagons; that if said Lavell Brothers are allowed the exclusive use of said platform west of said station house, it will give the said Lavell Brothers the entire control of the business of carrying passengers from the said station, to the discomfort, inconvenience, and detriment of said passengers, and to the injury and destruction of defendant's passenger-carrying business from said station; that defendants have not in any manner interfered with or hindered the plaintiff or Lavell Brothers in the handling or transportation of the United States mails over said railroad, or from said station to the postoffice in the city of Butte, or elsewhere; but have always allowed and conceded to the said plaintiff and to the said Lavell Brothers sufficient ground and space at and against said platform for the use of said Lavell Brothers' baggage wagon, omnibus, two carriages or hacks, and their wagons used in carrying United States mails, without any interference or hindrance from defendants, or either of them.

The defendants deny that if said acts of defendants complained of be allowed to continue the plaintiff will thereby suffer irreparable injury, or any injury whatever, or that if defendants continue said acts complained of, they will hinder, prevent, or delay the plaintiff in its business. And the defendants allege that it is not for the convenience of plaintiff's business that it has entered into said contract with said Lavell Brothers, as alleged in said complaint, but for the purpose of giving said Lavell Brothers an undue advantage over these defendants and other hackmen in the said passenger-carrying business from said station, and to exclude defendants and other hackmen from any competition in said business.

The foregoing facts are substantially the allegations of the complaint and answer respectively. No other pleadings were filed. Final hearing of the cause was had upon the facts set

forth in the complaint and answer, and determined in the court below, by an order setting aside the temporary injunction and denying the relief prayed for by plaintiff, from which order plaintiff appealed.

The whole question involved in this controversy is compassed by the proposition on the part of the plaintiff, "that it is the owner of said grounds, depot buildings, and platform, and that it may regulate the use of said platform as it desires, provided the traveling public is not inconvenienced; that it may, if it desires, engage in carrying passengers in hacks to and from its trains; that if it was so engaged, it would have the right to its own property for such purpose; that if it has such right, it can as well employ Lavell Brothers with hacks to do such service as to own the hacks; that if the plaintiff has the right to its platform, it has the right to sell that right to Lavells for a valuable consideration," and should be protected in the exercise and benefits of these rights.

These propositions are controverted by defendants, in so far as they affirm the right of the plaintiff to grant exclusive use of a portion of said platform to one party to approach and occupy the same to convey passengers thereto, and receive passengers therefrom, and exclude all others from so doing.

No complaint is made that any reasonable rule or regulation made by plaintiff for the government of its depot platform or grounds has been violated, or that defendants have committed any act which interferes with the transaction of plaintiff's business, except in so far as defendants interfere with the exclusive use of said portion of plaintiff's platform granted to Lavell Brothers.

In respect to the delivery of the United States mail matter at said platform, and transportation thereof to the United States postoffice in the city of Butte, it is admitted that ample space for that purpose is left to the use of the company and its employees, according to its requirements.

The question of handling the United States mail matter, it seems, is incidentally brought into this controversy, the transfer of this mail matter for the plaintiff being principally the consideration performed by Lavell Brothers for the grant of exclusive use of the designated portions of the railway platform to

them, at which place Lavell Brothers may ply for passengers to patronize their hacks and carriages. If the plaintiff has the right to grant the exclusive use of its platform in the respect mentioned, it may be granted for any other valid consideration as well. It is not denied that a railway company may make and enforce all reasonable rules and regulations necessary to govern persons coming to its station buildings, platform, and grounds. It is highly proper and beneficial to all concerned that this be done. The law recognizes this right on the part of the common carrier and the courts enforce it. Upon this point the learned counsel for appellant cites many authorities, with which this court agrees. But we conceive that the matter under consideration is a far different proposition. The grant of a special privilege to Lavell Brothers to use the specified portion of plaintiff's platform at said station, and the exclusion of all others from approaching thereto to land or receive passengers, is not a rule or regulation in the common acceptation of those terms as used in the legal authorities and applied to this subject.

We therefore find in the numerous and valuable authorities cited on that theory only general aid in solving this controversy.

A general rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity and not discrimination in its requirements. This controversy must be solved by a consideration of the mutual rights of the appellant as a common carrier and its passengers.

All passengers in common are entitled to equal opportunities and conveniences of place to approach and depart from plaintiff's trains. At the station mentioned, the railway company either commences or terminates its engagement to transport its passengers to and from said station, as the case may be. The contract of the railway company does not require that it either furnish conveyance to bring the passenger to said platform, or transport him therefrom. The passenger may employ whom he desires to bring him there for the departure on plaintiff's trains, or to meet and receive him on his arrival at said station. But the plaintiff contends that it may grant the exclusive use of a large portion of its platform to one party, at which to land passengers for departure on said trains, or to receive passengers from said trains; and if the passenger is willing to contract

with this one party for transportation thereto or therefrom, such passenger may have the convenience of landing or departing from that portion of said platform, otherwise he must land fifty feet away from said platform, or go to another portion of the platform, encumbered with express and baggage wagons, and the handling of freight and baggage matter.

Suppose a passenger travels every day from this station and returns, he is entitled to the same convenience and facilities for approaching and leaving this depot as other passengers.

If he contracts with another than Lavell Brothers, or the party to whom the railway company has granted the exclusive use of said portion of the platform, to bring him there and be there to receive him on his return, he must alight from his carriage or be received by it fifty feet away from said platform, or be landed where the express and baggage matter is handled, while the passenger who employs Lavell Brothers for the same purpose may land at and depart from this convenient portion of said platform. Or if a party desired to use his own carriage to bring him to said station or receive him on his return, it seems the same conditions would prevail.

Certainly, if the plaintiff has the right to grant the exclusive use of said platform to one, and exclude the public hackmen therefrom, it would apparently have the right to exclude the private hackmen therefrom. To the strong it would perhaps make no difference as a matter of convenience just where they were landed at or received from said station; but to the feeble and the helpless, and those encumbered with their care, it would be a matter of great discomfiture and inconvenience.

Still other conditions which directly result from the position demanded by plaintiff, and which militate against the equal rights of passengers, may be suggested.

Suppose all other hackmen who desire to compete with Lavell Brothers for the carrying of passengers to and from this depot will perform the service for half the sum charged by Lavell Brothers, are the passengers entitled to the benefit of this competition? Has not the passenger the right to call these other hackmen to his service, and if he does call them, has he not a right to have such other hackmen approach the platform at the same place, or at least have an equal and common chance to approach at this

same convenient place as his co-passenger who employs Lavell Brothers? If any of the passengers do accept these better terms, they must suffer the discrimination of being denied a landing at that portion of the platform granted exclusively to Lavell Brothers, or when they alight from plaintiff's trains they either go fifty feet away from that portion of said platform, or to the east side of the depot building, for transportation with a hackman at the lesser rate.

It is a rule of universal application that the public is entitled to whatever competition may grow out of the public demands, on the one hand, and the contest of others to supply such demands and receive the compensation therefor. Are not the conditions here sought to be so controlled by the plaintiff such as to stifle the natural development of such competition?

It is alleged by the plaintiff that by its arrangement with Lavell Brothers the latter engage to have a sufficient number of hacks and carriages at the arrival of all passenger trains to transport such passengers to the city of Butte from said station. But the plaintiff does not contract to carry its passengers destined to said station beyond that point, nor to see that such passengers are provided with transportation beyond that point. The plaintiff simply undertakes to reap a benefit from the necessity of its passengers, to procure on their own account, and from such party, and on such terms as they may, transportation to the city. This benefit is sought to be denied by the plaintiff, from a grant of the most favorable portion of the platform where plaintiff sees fit to land its passengers, exclusively to one party, to solicit their patronage, and for this grant such party aids plaintiff in carrying out its contract to deliver the United States mails at the postoffice in the city of Butte.

On principle, we cannot reconcile these conditions which are demanded by appellant with the rule that all who come to take passage, or who arrive at the station of a common carrier, are entitled to equal convenience and opportunity to approach said station, or depart therefrom. It seems to us that the direct effect of appellant's position is to say to its passengers, "You must employ Lavell Brothers, or suffer certain inconveniences in taking passage with another."

These observations are not to be confounded with the question

as to whether the railway company may not exclude all hackmen from its station buildings, or even from the platform, or set bounds on its grounds beyond which they should not come, as the exigencies of the situation and business might reasonably require, or to make and enforce any other reasonable rule as to the government of its depot buildings and grounds. It is not a general question of that character which here engages the consideration of the court.

The Constitution of this State, article xv., section 7, provides that "no discrimination, in charges or facilities for transportation of freight or passengers of the same class, shall be made by any railroad, or transportation or express company, between persons or places within the State."

The reported cases involving like or similar facts as the one at bar, which have come to our attention, are few in number. The recent case of *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, is the nearest in point. The facts involved in that case are quite similar to the case at bar, although it appears from the statement of facts and the opinion, that while exclusive grant was made by the railroad company to Porter and Sons to come upon the depot premises to solicit passengers and baggage for transportation, and all other hackmen were forbidden to come there for that purpose, still, all hackmen were allowed equal privileges to come to the station to deliver passengers and baggage, and to receive such as they had a previous order for.

While we concur in the general principles of law applicable to common carriers, announced by the majority of the nearly evenly divided court in that case, we cannot subscribe to the conclusions drawn by the majority. On the contrary, after a careful consideration of that case, we are inclined to adopt the reasoning and conclusion of the dissenting opinion delivered by the three minority judges. The majority opinion in that case very clearly and forcibly states the general principles of law governing common carriers, applicable to the present consideration. The court says: "The plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provides its depot for the use of persons who were transported on its cars to or from

the station, and holds it for that use, and it has no right to exclude from it persons seeking access to it for the use for which it was intended, and is maintained. It can subject the use to rules and regulations, but by statute, if not by common law, the regulations must be such as secure reasonable and equal use of the premises to all having the right to use them."

We do not find it consonant with reason, based upon those general propositions, to draw the conclusion that the railroad company may bring its passengers to a common landing, where the necessity, comfort, or convenience of their situation compels them to obtain on their own account transportation to some place beyond, and there introduce them to one favored party, saying, "If you engage transportation from this party, you may do so here on the spot, without delay or inconvenience, and take passage from this platform, without delay or inconvenience, provided you will engage this particular party and pay his demands, otherwise you must suffer the importunity of this party to take passage with him, and if you will not, you must suffer the inconvenience and delay of going to some other point to engage conveyance and take passage."

All this the railroad does, not for a benefit to the passenger, but for a benefit to itself, over and above what the passenger has paid for transportation over the railroad.

If the railroad company set bounds, beyond which all hackmen were forbidden to come, and undertook to forbid all solicitation within the depot or on the platform on the part of hackmen or others for employment, this would be an entirely different proposition. The company does not undertake to protect the passenger from that annoyance in these cases, but invites it, and farms out the exclusive privilege and opportunity to do this.

In the case cited *supra*, the majority of the court bases its conclusion on the ground that the hackman has no right or license to be in plaintiff's depot without the express or tacit permission of plaintiff, and this license, if granted, may be revoked at pleasure. We may grant this premise. The right which the railroad has to exclude all hackmen from its depot buildings and platform may rest upon the same principle. But ~~has the railroad~~ company in dealing with its passengers, and exercising a control over their movements and the conditions

which surround them for the time being, a right to place one hackman in their midst with exclusive control over the common conveniences and facilities of the place at which the passenger may land, or from which he may depart, so that if the passenger obtains the use of these conveniences and facilities he must purchase the privilege from such hackman or suffer discrimination? The use of these common conveniences and facilities belong to the passengers alike in the order in which they may come to occupy them; whereas, the railroad company has granted away what belonged to the passengers in common, and the one holding the grant may use it as an advantage over the passenger to compel his employment.

It is said in the opinion cited *supra*: "If a railroad company allows a person to sell refreshments or newspapers in its depot, or to cultivate flowers on its station grounds, the statute does not extend the right to all persons." Upon this proposition it might be suggested that the passenger has no common interest or rights which meet and intermingle with the rights of the common carrier on this subject, or which are affected by such a grant. The same reply may be made, we think, with good reason to the proposition as to a place to serve refreshments on the premises of the plaintiff. The passenger has no common rights which are taken away or interfered with by the company in this respect. It is true the passenger's necessities may require that he have food at proper times on his journey. But all passengers have an equal right to provide supplies under regulations which apply to all alike as to the amount of baggage allowed to each. Moreover, this question has no relation to the mutual engagements existing between the common carrier and its passengers. The passenger has purchased, or proposes to purchase from the common carrier, transportation, and he must come to the station to receive such transportation, and on arriving at his destination he must depart from the station. The right to come to the station and depart therefrom under reasonable regulations, which apply alike to all passengers without special conditions, is incidental to the main contract, while the supply of refreshments, or newspapers, or the cultivation of flowers at the station grounds has, as we conceive, no appropriate connection with the engagements of the passenger and the common carrier.

The case cited *supra* is the only American case brought to our attention which passes upon points directly involved herein. The subject is apparently a new one in this country. The English cases involving the main subject of controversy are also few in number.

In the case of *Marriott v. London & Southwestern Ry. Co.* 1 Com. B. N. S. 499, the complainant Marriott alleged that he brought passengers to defendant's railway station, and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other omnibuses, and upon this showing an injunction was granted. Other English cases bearing upon the main subject here under consideration have been examined. (*Beadell v. Eastern Counties Ry. Co.* 5 Com. B. N. S. 509; *Painter v. Lord Brighton & S. C. Ry. Co.* 5 Com. B. N. S. 70; *Barker v. Midland Ry. Co.* 18 Com. B. 46.) The demands in the case at bar, on the part of plaintiff, go beyond those urged in any of the cases so far examined by us.

Upon grounds of sound reason, public policy, and the general principles of law governing common carriers, as well as the provisions of our constitution, we believe the order of the court below ought to be affirmed, and it is so ordered.

BLAKE, C. J., concurs.

Associate Justice DE WITT, having been counsel for plaintiff in this action in the court below, did not sit in the consideration thereof in this court.

CITY OF BUTTE, RESPONDENT, v. COHEN ET AL.,
APPELLANTS.

OFFICIAL BONDS—Construction—General and particular provisions—Judgments—

Liability of sureties.—In an action against the sureties, upon the official bond of their principal, a city treasurer, for a breach thereof, where the sureties had limited their penal obligation to specified sums, which sums were also set opposite their respective signatures, and the bond contained a general provision as follows: "For the payment of which well and truly to be made we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents." *Held*, that this general provision of the bond being inconsistent with the particular provision limiting the liability of the

sureties, the latter would prevail, and the sureties were bound severally and not jointly. *Held, also*, that in case of a breach of the condition of the bond, the judgment against any surety should not exceed the amount for which he bound himself, and might be enforced to that amount against each surety sued until the judgment was satisfied.

SAME — Sureties — Defense — Specific denial. — It is a good defense to an action against the sureties on the official bond of a city treasurer that such treasurer was, by an ordinance of the city, entitled to receive as compensation one sixth of all moneys collected by him, whereas he had only retained one tenth, and that the difference would more than counter-balance the amount he was charged with having embezzled; and such defense is available to the sureties under a specific denial.

Appeal from Second Judicial District, Silver Bow County.

The cause was tried before McHATTON, J.

John F. Forbis, for Appellants.

The court erred in overruling the defendants' demurrer to the complaint, for the reason that the bond upon which this action is based is certainly a separate and not a joint bond. That the parties did not enter into a joint obligation at all. If the defendants cannot take advantage of this defect upon demurrer, we claim that it was still error to render a joint judgment upon the complaint based upon this bond. (*Moss v. Wilson*, 40 Cal. 159.) The evidence in this case does not sustain the findings of the court. The plaintiff did not prove that there was ever at any time a license levied in Butte City, or that there was an ordinance of the city authorizing the collection of a license. If Leiter imposed upon the citizens by collecting a license which was not legal, or, in other words, collecting something which there was not any legal authority for, he might be held personally for his fraud or oppression. But surely no legal authority will hold that his official sureties can be held for his unofficial act. Ordinances must be proved, and are not like a law that proves itself, and in the absence of the proof of an ordinance it will not be presumed by a court that an ordinance exists. (*Haven v. New Hampshire Asylum*, 13 N. H. 532; 38 Am. Dec. 512; *Lucas v. San Francisco*, 7 Cal. 474; *Harker v. Mayor*, 17 Wend. 199.) The only evidence in the case of Leiter's defalcation was the book kept by him as city treasurer. The plaintiff never proved, or offered to prove, what accounting Leiter made to his successor in office. The city did not prove,

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or attempt to prove, what amount Leiter returned to the city in lieu of the amount he collected. It devolves upon the city to show what amount he returned. If Leiter had been paid the amount that was due to him from the city, as shown by his statement and the ordinance in evidence, the city would be no loser, for it appears that he retained only ten per cent of the licenses collected by him, whereas the ordinance allowed him one sixth. The difference would more than offset the amount which it is claimed Leiter has embezzled. The burden of proving all of these things rests upon the plaintiff. (Murfree on Official Bonds, § 593; *Town of Sherwood Forest v. Benedict*, 48 Wis. 541.) The defendants in this case are innocent parties, and have not the evidence within their reach to exculpate Leiter or to show the state of his accounts. The city is presumed to have all necessary evidence to show exactly how he stands, and if it has not, it cannot insist that defendants produce it. To hold the defendants to the rule laid down by the trial judge would be to cast the burden of proof upon the defendants and compel them to prove that Leiter has not defaulted. There was no proof whatever that Leiter's term of office had expired, or that his successor in office had qualified. This proof is necessary to hold the sureties. (*Hiatt v. State*, 110 Ind. 472.)

Frank E. Corbett, and *McBride & Haldorn*, for Respondent.

The trial court did not err in overruling the demurrer to plaintiff's complaint. The obligation entered into by defendants with the city of Butte was joint and several (Murfree on Official Bonds, § 251; *People v. Slocum*, 1 Idaho, 62), and parties jointly liable may be jointly sued. If the action was properly brought against defendants jointly, a joint judgment could be entered. The evidence proves that the act of collecting licenses was by Leiter, as treasurer of the city of Butte, and was therefore received by the treasurer by virtue of his office. This money collected as treasurer should have been paid over to the city, and not being paid over, the bondsmen are liable. If the licenses had been unlawfully demanded by the city by ordinance and collected by the treasurer, and such unlawful ordinance proved at the trial, the evidence would be no better than

at present, and still the bondsmen would be liable. (*Waters v. State*, 1 Gill, 302; *Thompson v. Stickney*, 6 Ala. 579; *Evans v. Trenton*, 4 Zab. 764.) The only evidence of Leiter's transactions in office were his books kept by him as city treasurer. The books of the city treasury are the evidence of what sums of money the treasury holds. No other proof would be competent. The books of Leiter should show the amounts received by him. The evidence proves that other sums of money than those shown on the books were received by Leiter as treasurer of the city of Butte. It is for these latter sums that the trial court has entered judgment. No counter-claim has been set up by the defendants. The one sixth of licenses claimed by defendants it is not in the power of the city treasurer to retain. It is set up in the complaint that Leiter was elected for one year from and after the sixteenth day of May, 1883. This fact was not traversed, and is therefore admitted, and will be assumed by the appellate court. The conclusion is that Leiter has served his term. (*Love v. Sierra Nevada L. W. & M. Co.* 32 Cal. 639; 91 Am. Dec. 602.) The evidence shows Simon Jacobs in office as city treasurer of the city of Butte on the day of trial, and the court may properly conclude that Leiter is out of office. (*Commonw. v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712.) Where there is some evidence to support judgment, court will not reverse the judgment. (*Ming v. Truett*, 1 Mont. 328; *Dexter v. Cole*, 6 Wis. 319; 70 Am. Dec. 465.) To warrant reversal on the ground that there is no evidence to support the verdict, the cause must be unproved in its entire scope. (*Urdike v. Abel*, 60 Barb. 15-22; 10 Am. Law Reg. 747.)

HARWOOD, J.—The appellants in this action were sureties with others on the official bond of one Edwin G. Leiter, treasurer of the city of Butte. The said bond is in words and figures as follows:—

“Know all men by these presents, that we, Edwin G. Leiter, as principal, and D. H. Cohen, Paul Davis, Charles Schlessinger, Samuel Lewis, and James R. Boyce, Jr., as sureties, are held and firmly bound unto the city of Butte in the following penal sums, to wit, the said principal in the penal sum of five thousand dollars (\$5,000), and the said sureties in the following

penal sum of five hundred dollars (\$500), the said Paul Davis in the penal sum of five hundred dollars (\$500), the said Charles Schlessinger in the penal sum of five hundred dollars (\$500), the said Samuel Lewis in the penal sum of five hundred dollars (\$500), and the said James R. Boyce, Jr., in the penal sum of three thousand dollars (\$3,000), for the payment of which well and truly to be made we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents.

"Sealed with our seals, and dated this sixteenth day of May, 1883."

The condition of the foregoing obligation is such, that whereas the above bounden principal, Edwin G. Leiter, was at a general election held in and for the city of Butte, Silver Bow County, Montana Territory, on Monday, the seventh day of May, 1883, duly elected treasurer and assessor in and for said city.

"Now, therefore, the condition of this obligation is such that if the said Edwin G. Leiter shall well, truly, and faithfully perform all the official duties pertaining to said office, and required of him by the laws and ordinances of said city, and shall pay over according to said laws and ordinances all moneys which shall come into his hands as treasurer and assessor in and for said city of Butte, and will render a just and true account thereof whenever required by the city council of said city, and shall deliver over to his successor in office all moneys, books, papers, and other things appertaining thereto, or belonging to his office, then the above obligation to be null and void, otherwise to remain in full force and effect.

	"EDWIN G. LEITER,	[SEAL.]
"\$500	D. H. COHEN,	[SEAL.]
"\$500	CHAS. SCHLESSINGER,	[SEAL.]
"\$3,000	J. R. BOYCE, JR.,	[SEAL.]
"\$500	S. LEWIS,	[SEAL.]
"\$500	PAUL DAVIS."	[SEAL.]

This action was brought to recover from the defendant sureties the sum of \$814.95 alleged to have been collected by said principal, as treasurer of the city of Butte, as taxes and licenses belonging to said city, and embezzled and retained by said pri-

principal, Edwin G. Leiter, in breach of the covenants of said bond. The said Edwin G. Leiter, principal, was not made a party defendant in the action. As a result of the trial of the action judgment for \$652.09 and costs, amounting to \$109.50, was rendered against defendants, D. H. Cohen, Paul Davis, Samuel Lewis, and James R. Boyce, Jr.

The first question presented for determination on this appeal is, whether under the terms and conditions of said bond a judgment for the sums and costs aforesaid can be lawfully rendered against the defendant sureties, jointly and severally, whereas the appellants contend some of said sureties expressly undertook and bound themselves by the terms of said bond for a penal sum less than the amount of the judgment. In other words, the question to be determined is, whether the sureties on said bond are only bound severally for the amounts set opposite their respective names in the body of said bond, and set before their respective names at the place of signing the same.

Upon the subject of the construction of instruments, the statute of this State (Comp. Stats. § 631, Code Civ. Proc.) provides as follows: "In the construction of a statute, the intention of the legislature, and in the construction of an instrument, the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (§ 336.) "When the terms of an agreement have been intended in a different sense by the different parties to it, the sense is to prevail against either party in which he supposed the other understood it; and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made." Applying these rules of construction to the instrument in question we find no difficulty in constructing it.

The evident intent of the parties who executed this bond is plain. It recites in the body thereof: "That we, Edwin G. Leiter, as principal, and D. H. Cohen, Paul Davis, Charles Schlessinger, Samuel Lewis, and James R. Boyce, Jr., as sureties, are held and firmly bound unto the city of Butte in the following penal sums, to wit, the said principal in the

sum of five thousand dollars (\$5,000), and the said sureties in the following penal sum of five hundred dollars (\$500), the said Paul Davis in the sum of five hundred dollars (\$500), the said Charles Schlessinger in the penal sum of five hundred dollars (\$500)," etc. Now, if the said Paul Davis and other sureties who recited that they were bound in the sum of five hundred dollars, intended to be bound in the sum of five thousand dollars (\$5,000), why did they make these particular provisions that they were bound in the sum of five hundred dollars? Again, at the place where these sureties sign the bond is written before each of their names a sum like the one expressed after their names respectively in the body thereof. It is plain that each intended to be bound in the sum expressly stated for each of them, as distinguished from the amount that the principal was bound for. So far there appears to be no ambiguity or inconsistency in the language of the bond. There is a phrase, however, further along in the contents of the bond which appears to be inconsistent with these particular limitations and several character of the penal sums for which each surety undertook to be bound. That phrase is as follows: "For the payment of which well and truly to be made we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents." It is contended by respondent that this provision binds the sureties jointly and severally for the whole penal sum of five thousand dollars. This is certainly a general provision in the bond, and is inconsistent with the particular provisions which go before it. Apply the statutory rule above quoted to this state of facts, the particular provisions must prevail over the general.

It appears from the complaint that the plaintiff understood the liability of the sureties to extend to the amount stated in the bond as the penal obligation of each surety.

The seventh paragraph of the complaint alleges: "That by reason of the breach aforesaid, the defendants have forfeited the said bond, and become and are indebted to plaintiff in the respective sums set after their names in said bond." We think this instrument should be construed as binding the sureties severally, for that amount expressly stated in the bond as the obligation respectively undertaken. Hence the judgment

against any surety should not exceed the amount for which he bound himself in case of a breach of the condition, and may be enforced up to that amount against each surety sued until the judgment is satisfied. (*People v. Edwards*, 9 Cal. 286; *People v. Love*, 25 Cal. 521; *People v. Rooney*, 29 Cal. 643; *City of Los Angeles v. Mellus*, 59 Cal. 444; *Moss v. Wilson*, 40 Cal. 159; *Bank of Brighton v. Smith*, 12 Allen, 243; 90 Am. Dec. 144; *New Hampshire Bank v. Willard*, 10 N. H. 210; *Murfree on Official Bonds*, §§ 236, 237.)

If this was the only error complained of by appellants, the judgment in the court below should be modified to conform to the foregoing conclusions, but there are other assignments of error which demand consideration.

The complaint in this action alleges: "That while the said Leiter was, and acted as, such treasurer and assessor, he committed a breach of the condition of said bond by misappropriating, embezzling, and failing to account for moneys collected by him for the use of the plaintiff, and by otherwise failing to well, truly, or faithfully perform his official duties to said office, and failing to pay over according to the laws and ordinances the money which came to his hand as treasurer and assessor as aforesaid, and by failing to render a just and true account thereof; and more particularly by embezzling and converting to his own use, and failing to account for the sum of \$585, collected by him as such treasurer and assessor, for licenses collected at various times from divers and sundry persons, and the further sum of \$218.96 collected by him as such officer for taxes collected at various times from divers persons."

The defendants appeared, and by answer made specific denial of all the allegations of the complaint.

To establish the allegations of the complaint the plaintiff offered, and the court admitted in evidence, certain books provided by ordinance of said city pertaining to the city treasurer's office kept by said Leiter. According to the showing on the face of said books a number of parties appeared to be indebted to the city for taxes or licenses, but upon investigation such parties produced a receipt from said Leiter, or other competent evidence, showing that such payments had been made. The books, on the other hand, did not show that said money had been paid over

or accounted for to the city. The aggregate of the various amounts so proved is, we presume, the amount of the judgment, \$652.09. Having made such showing, the plaintiff's counsel offered, and the court received in evidence, section 9 of Ordinance No. 5 of said city, which provides, among other things, that, "it shall be the duty of the city assessor, as *ex officio* treasurer and collector, to keep a true account of all moneys received by him, stating from whom, and on what account the same was received, in suitable books to be provided by the city council, and kept by him for that purpose." And with this proof the plaintiff rested its case.

The defendants then offered in evidence on their defense section 8 of said Ordinance No. 5, which was admitted by the court without objection, and which provides, among other things, that the city treasurer "shall receive one sixth of all moneys collected by him, and such other compensation as the city council may allow." The defendants further offered, and the court received in evidence the books of account kept by said treasurer, which showed the amount of licenses collected and turned into the city treasury by said Leiter during the time he acted as treasurer, and during the time the said defalcations are alleged to have occurred. In this respect the books showed that during said period the sum turned into the treasury was \$9,247.55. These books also showed that said treasurer had received only ten per cent, or one tenth of said collections as compensation, whereas, the said ordinance allowed him one sixth thereof, or sixteen and two thirds per cent. The appellants contend that this additional allowance which would be due to said treasurer on the showing of the books should be considered by the court to the extent of the sum it amounted to, as a bar to recovery against the defendant sureties of the sum proved to have been collected and retained by said Leiter. We are of opinion that this ought to have been so considered. The defendants had denied in effect that the said Leiter, for whom they were sureties, had retained and converted to his own use moneys belonging to the city, as alleged in the complaint. They were there making proof upon their side of the issue presented by such allegations and denials. The books required to be kept were properly introduced to prove facts which the ordinance required to be recorded in them,

and these entries were made by the treasurer against his interest. (*Coleman v. Commonw.* 25 Gratt. 865; 23 Am. Rep. 711.) No evidence was introduced in rebuttal of the showing made by the defendants.

It is urged by counsel for plaintiff that the defendants should have set up these facts in their answer, in order to avail themselves thereof in defense on the trial, and is suggested by counsel for plaintiff that if that showing was allowed, it would more than counter-balance the whole deficit proved by plaintiff, and defendants would be entitled to a balance from the city; that the only way defendants can avail themselves of a counter-claim is to set it up by answer or cross-complaint. We do not agree with that proposition. This action is not against the principal, but is brought against certain sureties. The sureties in this action are not entitled to a counter-claim or set-off, which exists in favor of the principal as between him and the city. But the sureties are entitled to defend against the main allegation which involves them in a liability.

These defendants are entitled to prove facts which would bar a recovery against them on an issue raised by the allegations of the complaint, and a specific denial of such allegations by answer. The principal, Leiter, if a party defendant to this action, could likewise make the same showing on a simple denial of the allegations of the complaint to bar a recovery. If he was shown to be entitled to a certain portion of the moneys collected, and this amount was proved, or the facts from which the mathematical deduction can be made with certainty, and this amount exceeded what he was charged with having retained, then this showing would be a bar to recover from him or his sureties. Surely, what would be allowed to the principal in an accounting with the city, *a fortiori*, should be considered when proved on behalf of the sureties in an action for a breach of the covenants of the bond.

The judgment is reversed, and the case remanded to the trial court, to enter a judgment in conformity with the conclusions herein expressed.

BLAKE, C. J., and HARWOOD, J., concur.

STATE, RESPONDENT, v. KING, APPELLANT.

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GRAND JURY—Organization—Challenge to panel.—In the case at bar the judge of the district in which the defendant was tried ordered a grand jury to be summoned, and afterwards directed that the venire be returned, and the persons who had been served, notified that their services would not be wanted. The sheriff's return showed that all the persons drawn to act as grand jurors had been served. Upon the meeting of the court it was ordered as follows: "It appearing that no grand jurors have been summoned and that a grand jury is wanted: Ordered, that the judge and clerk of this court do forthwith prepare a list of twenty persons competent to serve as grand jurors, who shall be summoned by the sheriff to be and appear before said court on the ninth day of January, 1890, at ten o'clock, A. M." The persons summoned under the latter order were selected to serve. A challenge interposed by the defendant to the panel, for the reason that the same was not drawn in accordance with the essential provisions of the law of Montana, was overruled. *Held*, that under section 14 of an act relating to jurors, approved March 14, 1889, making it lawful for the judge of the District Court and the clerk of the court to prepare a list of names of persons to be summoned as grand jurors, when from any cause during the term of a court a grand jury is wanted, and under section 8, article iii. of the Constitution, declaring that a grand jury shall only be drawn and summoned when the district judge shall in his discretion consider it necessary and shall so order, the grand jury was legally organized, though the order did not show the necessity therefor, and though it consisted of seven persons. *Held, also*, that the prosecution of the defendant by indictment and not by information was proper. (Case of *State v. Ah Jim*, ante, p. 167, affirmed.)

INDICTMENT—Two offenses—Accessory.—An indictment which charged the appellant with murder in the first degree and another person with being an aider and abettor is not demurrable as charging two offenses, as under the laws of this State an accessory may be charged, tried, and convicted in the same manner as if he were principal.

EVIDENCE—Res gestæ—Proof of threats.—The testimony of a witness who heard the defendant say to his accessory, a few moments before the shooting, that he would "kill the son of — — —" is part of the *res gestæ* and admissible, though the threat did not disclose the name of any person, it being established by the evidence that the person so threatened was the deceased.

INSTRUCTION—Reasonable doubt.—An instruction, defining a reasonable doubt, which uses the phrases, "in their own most important concerns or affairs of life," and "in the graver and more important affairs of life," is not erroneous as conflicting.

Appeal from Fifth Judicial District, Jefferson County.

The defendant was tried before GALBRAITH, J.

George D. Greene, and W. L. Hay, for Appellant.

The court erred in overruling the defendant's challenge to the panel of the grand jury. (Laws of 16th Legislative Assembly, p. 166, §§ 4, 14; Comp. Laws, p. 427, § 119; p.

428, § 129; *McQuillen v. State of Mississippi*, 8 Smedes & M. 597.) The court cannot at his will discharge a grand jury regularly drawn. (*State v. Bowman*, 73 Iowa, 110; *Judge v. State*, 8 Ga. 173; *Mosseau v. Veeder*, 2 Or. 113; *State v. Jacobs*, 6 Tex. 99; *O'Byrnes v. State*, 51 Ala. 25.) The judge and clerk alone should have selected the grand jury. (Laws of 16th Legislative Assembly, p. 166, § 14.) The order of the court directing the selection of a grand jury should show the necessity therefor. (Const. § 8, Declaration of Rights.) The defendant had the right to have the panel of the grand jury challenged by him under the direction of the court, and not seven of them only, to inquire into the charge against him. (Comp. Stats. p. 428, § 121.) It is admitted that the defendant was duly committed by an examining magistrate, and in such cases a prosecution cannot be had by indictment under the constitution of this State. (Declaration of Rights, § 8; Enabling Act, § 24.) The indictment was found by an illegal jury in this: A grand jury was drawn by the jury commissioners and discharged by the court without cause after nine of them had been summoned by the sheriff in accordance with law. Another grand jury was drawn under an order of the court by the judge and clerk thereof, which last-mentioned grand jury found the indictment under which the defendant was tried and convicted. Said indictment was therefore void. (*State v. Bowman*, 73 Iowa, 110, and cases cited *supra*.) The court erred in overruling the defendant's demurrer because two separate offenses are charged against different individuals in the same indictment. (Comp. Laws, p. 443, § 212.) L. T. Moffatt and Henry Guthrie were not competent trial jurors. (*United State v. Upham*, 2 Mont. 170.) The testimony of John Harrington was incompetent and immaterial and tendered to prejudice the minds of the jury. Instruction No. 16 conflicts in its definition of the term "reasonable doubt," and tended to confuse the minds of the jury as to the correct meaning of that term. (Hayne on New Trial and Appeal, § 123, and cases cited; *People v. Messersmith*, 57 Cal. 575; *Chicago etc. R. R. Co. v. Payne*, 49 Ill. 499.)

Henri J. Haskell, Attorney-General, and *M. H. Parker*, County Attorney, for the State, Respondent.

Appellant's first point is not well taken. So much of section 8 of the bill of rights, which provides for the prosecution of criminal actions in the District Court by information, is not self-executing. (*State v. Ah Jim, ante*, p. 167.) To sustain the challenge interposed by defendant on this ground would necessitate declaring the entire section of the bill of rights self-executing. This would be in contravention to the ruling of this court in the case last cited, as well as the cases of *Kring v. Missouri*, 107 U. S. 221; *People v. Tisdale*, 57 Cal. 104; *In re Petty*, 22 Kan. 477. The second ground of challenge is not tenable for the reasons: (1) The challenge does not specify wherein the drawing did not comply with the requirements of the law of this State. (2) It is within the discretion of the court, if the grand jury impaneled is not competent as such, to investigate the charge against any person held to answer for an offense, by an order, to be entered in its minutes, to direct the clerk of the court to issue a venire to the sheriff commanding him to summon another grand jury. (3) Where the grand jurors have been summoned, and by the court excused or discharged, it shall be lawful for the judge of the District Court, and for the clerk of the court or his deputy, under the direction of the judge, to prepare a list of the names of a sufficient number of persons competent to serve as grand jurors, who shall be summoned by the sheriff to attend at such time as the court may direct. The fourth point made by appellant involves a constitutional question, which has been passed upon by this court in the case of *State v. Ah Jim*, and adversely to the defendant. It raises the question of procedure, and further, that the rule of procedure in force at the time shall not be altered so as to affect the party charged. The converse of this proposition is that there is no such thing as a vested right to a particular remedy. (*Sharp v. Contra Costa County*, 34 Cal. 284; *People v. Mortimer*, 46 Cal. 118; *People v. Campbell*, 59 Cal. 243; *Springfield v. Hampden Commrs.* 6 Pick. 508; Cooley on Constitutional Limitations [4th ed.], p. 331.) We do not consider that the first and second points raised by the demurrer are well taken, for the reason that the demurrer must distinctly specify the grounds of the objection to the indictment. It must point out wherein more than one offense has been charged. It must distinctly specify what

two persons have been charged, and the offense each is charged with. The law makes the accessory before the fact the same as the principal, therefore the indictment shall charge but one offense; but it may set forth such offense in different counts. (§ 188, p. 438, Comp. Stats.) The giving of instruction 16 by the court is claimed as error in this, that the same is not law and is misleading. That the same is law, see Sackett on Instructions to Juries, p. 481, §§ 1, 2, 4; 3 Greenleaf on Evidence (13th ed.), § 29, and note; *Commonw. v. Webster*, 5 Cush. 320; *Miller v. People*, 39 Ill. 464.

BLAKE, C. J.—The defendant was found guilty of the crime of murder in the first degree, and this appeal has been taken from the order of the court below in overruling the motion for a new trial. The appellant and George Peters were indicted January 14, 1890, by a grand jury, consisting of seven persons, and separate trials were demanded and allowed. The alleged offense was committed November 29, 1889, in the county of Jefferson.

The first error that is assigned appears in different motions, and relates to the organization of the grand jury that returned the indictment. The following order was made at chambers November 25, 1889, by the judge of the judicial district:—

“Ordered, that out of the twenty persons whose names are contained in the proper envelope, labeled as follows, to wit, ‘grand jurors’ for the next regular term of the District Court of Jefferson County, the names of nine of said persons be drawn by the clerk of said court, or his proper deputy, and of the judge of said court if he be there present, in the presence of the sheriff, or his proper deputy, to be summoned as grand jurors, to serve at the next regular term of said court, which commences on the first Monday in January, A. D. 1890, and that a proper venire do issue for said nine persons, returnable on the first day of said term, at ten o’clock, A. M. See Laws of Montana, Sixteenth Session, pages 166 and 167, and especially sections 4 and 7, and in so far as possible conform with the provisions thereof. In re.” This order was complied with, and the venire containing the names of the above described nine persons was issued to the sheriff November 30, 1889. The judge of the District Court

instructed the clerk by a letter which was received December 15, 1889, to "advise" the officer that he had "concluded to dispense with the use of a grand jury at the January prox. term," and to return this venire; and also to notify the persons who had been summoned that their services would not be wanted. The clerk acted accordingly. The sheriff made his return on the venire January 1, 1890, showing that all of these persons had been personally served to appear and act as grand jurors. The following order was made by the court January 7, 1890: "It appearing that no grand jurors have been summoned and that a grand jury is wanted: Ordered, that the judge and clerk of this court do forthwith prepare a list of twenty persons competent to serve as grand jurors, who shall be summoned by the sheriff to be and appear before said court on the ninth day of January, 1890, at ten o'clock, A. M." In conformity therewith, these persons were selected to serve as grand jurors, and in open court, the defendant was notified of his rights of challenge before they were sworn. A challenge was then interposed to the panel "for the reason that the same was not drawn in accordance with the essential provisions of the laws of Montana." The particulars will be commented on hereafter. This challenge was overruled, and thereupon the clerk, by order of the court, selected by lot from this list of twenty a grand jury composed of seven persons, who were duly sworn and charged. The foregoing indictment was presented January 14, 1890.

The challenge to the panel is based upon the provisions of the Criminal Practice Act, Compiled Statutes, third division, section 119. The appellant contends that the persons who were summoned to serve as grand jurors under the order made November 25, 1889, were discharged without lawful authority, and that the proceedings by virtue of the order made January 7, 1890, were void. The act relating to juries, approved March 14, 1889, should be faithfully executed so that the names of the persons who may become grand or trial jurors shall be always selected by the commissioners who are designated. But circumstances may arise which will render its requirements nugatory, and the transcript shows that this event occurred. The statute, however, provides directly for this contingency in these terms:—

"When, for any cause on the meeting of, or during the term

of a court, a grand jury is wanted, or there is not a sufficient number of grand jurors present, or those summoned have been excused or discharged, it shall be lawful for the judge of the District Court, and for the clerk of the court, or his deputy under the direction of the judge, to prepare a list of the names of a sufficient number of persons competent to serve as grand jurors, who shall be summoned by the sheriff to attend at such time as the court may direct." (§ 14.)

The constitution declares that "a grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary and shall so order." (Art. iii. § 8.) It is claimed that the order complained of should show the necessity therefor. While the clause is self-executing, and the language of the statute has been followed in stating that it appears that a grand jury is wanted, it is evident and will be presumed that the judge considered his action necessary.

It is maintained by the appellant that the grand jury should have consisted of sixteen persons; that the statute requiring the foreman to indorse indictments does not contemplate a body of any other number; and that the prosecution should have been by information. We have placed these matters together, because they have received due consideration in the case of *State v. Ah Jim*, ante, p 167. These constitutional questions were therein examined and determined adversely to the position of the appellant, and we affirm its conclusions. The indictment was found by a legal grand jury, and the challenge to the panel and the motion to quash the indictment were properly overruled.

A demurrer to the indictment was submitted upon the ground that two offenses are charged, one against the appellant for murder in the first degree, and the other against Peters for being an aider and abettor. The statute has abolished the refined distinctions which formerly prevailed in this regard, and provides as follows: "Any person who counsels, aids, or abets in the commission of any offense, may be charged, tried, and convicted, in the same manner as if he were a principal." (Comp. Stats. third div. § 176.) In *People v. Davidson*, 5 Cal. 134, the Supreme Court interpreted a similar law and said: "The indictment, in charging Davidson and Kennedy with an assault with an intent to commit murder, and afterwards Kennedy with

being an accessory, charges but one offense. . . . It is not error to charge the defendant as principal and accessory in the same indictment."

It is argued that the testimony of John Harrington "was incompetent and immaterial, and tended to prejudice the minds of the jury." This was in substance that he was standing by the door at the head of the stairs, and heard the defendant say when going out of the door that he would kill the son of ———. "King was talking to Peters. He did not say who he would kill." It is uncontradicted that there was a difficulty between the accused parties and the deceased in the hall spoken of by the witness, where there was a dance, and that they passed down the stairs a few moments before the fatal shot was fired by the appellant. James Higgins testified that he "saw King and Peters there at the foot of the stairs . . . and I heard Thomas King say 'smash the son of ——— when he comes down the stairs.' He made this remark to George Peters, and he did not say the name of any party or person." We are satisfied, after the reading of the evidence, that the testimony of the witness, Harrington, was a part of the *res gestæ*, and should therefore be considered by the jury in its relations to the entire transaction. The bare fact that the threats thus uttered did not disclose the name of any party did not make them immaterial or irrelevant. The evidence in the transcript establishes beyond a reasonable doubt that the person so threatened was the deceased.

An examination of the record shows that every issue in the case was thoughtfully covered by the court in twenty-nine instructions. They follow the sections of the statute, which, with some modifications and explanations that should be adjusted to the exceptional facts of each controversy, embody the law which is applicable. No requests were made by the appellant for further instructions, and he now attacks with authorities that which defines a reasonable doubt, and the sole criticism is that it embraces conflicting phrases. It is claimed that the expression, "in their own most important concerns or affairs of life" contradicts the words, "in the graver and more important affairs of life." Viewing the whole paragraph, there is no difference in the meaning of both clauses, and the rule that con-

flicting instructions are erroneous has no bearing upon the proposition.

We conclude that the appellant has had a legal trial, and that the verdict is founded upon the law and the evidence.

It is therefore ordered that the judgment be affirmed, and that the same be carried into effect as entered in the court below.

HARWOOD, J., and DE WITT, J., concur.

O'DONNELL, APPELLANT, v. GLENN, RESPONDENT.

MINES AND MINERAL LANDS—Location notice—Verification.—A location notice of a mining claim is fatally defective which fails to state under oath the date of the location. (Case of *O'Donnell v. Glenn*, 8 Mont. 248, affirmed.)

MAXIMS—Communis error facit jus—Application.—In the application of the maxim *communis error facit jus* the existence and effect of the common error is a question of law for the court, and not a question of fact for the jury.

MINES AND MINERAL LANDS—Verification of location notice—Communis error facit jus.—Where it appeared that a particular form of verification to notices of location of mining claims had been used in a county in the Territory in not to exceed thirty-three per cent of the notices of location, extending over a period of three years, and which form was not in compliance with law, the maxim *communis error facit jus* does not apply, and it is error to instruct the jury that "the failure or omission to give the date of the location in the verification did not render the location invalid (the error or omission having been one of frequent occurrence at the time)."

COMMUNIS ERROR FACIT JUS.—The court laid down the following principles governing the application of the maxim *communis error facit jus*, subject to the qualification that in every case some of them are applied, while in some cases some of them may be disregarded, each case depending upon its own facts, and holding that the facts in the case at bar were almost wholly in conflict with all of such principles: (1) The common error must be one having some judicial or professional recognition, approved or tolerated by decisions of judges or opinions of lawyers. Or to put the rule less positively, such judicial or professional recognition adds to the law-making force of the common error. We further qualify the rule in this, that common error may possibly have the law-making power, when supported by lay opinion only, provided that other rules may be forcibly applied. (2) Courts will not likely or inconsiderately allow a common error to subvert a rule of law, or abrogate a positive statute. (3) The error must be a universal or very general one. The nearer universal, the more forcibly will it address itself as a law-maker to the approval of courts. (4) The acquiescence in the common error has involved, or there depends upon it, large property interests. (5) The error must be one that the people have relied and acted upon, and have fixed their rights and positions thereby. (6) The longer the error has existed the greater force it has. (7) The error must be clearly proved. (8) The error must be one in the observing, construing, or interpreting law, and not an error in directly disobeying and abrogating that which is law.

9	452
15	251
15	416
23*	1018
38*	1076
39*	465
9	452
16	236
9	452
124	116
9	452
30	181
9	452
133	62

Appeal from Second Judicial District, Silver Bow County.

The cause was tried before DE WOLFE, J.

Statement of facts, prepared by the judge who delivered the opinion.

This action is the ordinary one between claimants of quartz mining ground, brought to determine the right of possession and the right to proceed in the United States land office to obtain a patent to the premises.

The plaintiff founds his rights upon a location of a claim called the Flap Jack; defendants upon their Argonaut Claim. The respective locations are in geographical conflict.

The validity of the Argonaut location notice was contested upon the trial. The notice and verification thereto is as follows:—

“Notice is hereby given that the undersigned, having complied with the requirements of chapter 6 of title 32 of the Revised Statutes of the United States, and the local laws, rules, and regulations and customs of miners, have located 1500 linear feet on the Argonaut lode (——— acres plain mining ground), situated in Summit Valley Mining District, Deer Lodge County, Territory of Montana, and being more particularly described as follows, to wit: Beginning at a stake at the southeast corner, and running west 1500 feet, thence north 600 feet, thence east 1500 feet, thence south 600 feet to place of beginning. Said lode is bounded on the south by the Silversmith, and southwest by the Goldsmith, and on the east by what is known as the Rooney lode. Above lode runs 900 feet easterly and 600 feet westerly from discovery shaft, and 300 feet on each side.

“Located Dec'r 22, 1880.

Attest:

“JOHN H. GLENN,

“JOHN HALL,

“JOHN B. CAMERON.

“TERRITORY OF MONTANA, }
COUNTY OF DEER LODGE. } ss.

“J. B. Cameron, first being duly sworn according to law, deposes and says: That we are citizens of the United States, and are the locators of the following described mining premises;

that the description therein contained, as beginning at a stake at the southeast corner, running west 1500 feet, thence north 600 feet, thence east 1500 feet, thence south 600 feet, to the place of beginning, is true; and that the locators, whose names are subscribed thereto, are *bona fide* residents of Montana Territory.

“JOHN B. CAMERON.

“Subscribed and sworn to before me this twenty-fourth day of December, 1880. A. H. BARRET, Notary Public.

“Filed for record Dec'r 27, 1880, at 11:30 o'clock, A. M.

“JAS. S. McANDREWS, County Recorder.”

This case was before this court at the July term, 1888, and the location notice above recited was then held to be fatally defective by reason of the verification omitting to state the date of the location. (8 Mont. 248.)

On the new trial granted by this court, from which trial this appeal is now prosecuted, the District Court admitted this notice in evidence, upon testimony and a theory that were not before this court at the hearing, July, 1888. Defendants introduced testimony for the purpose of showing that large numbers of mining location notices, with verifications of the sort annexed to the above, were used and recorded in the county about the time this notice was filed; and urged that the fault of the verification was common among the people at that period, and that large property interests were involved in the construction of the verification, and invoked the maxim, *communis error facit jus*. The evidence introduced for this purpose, from the records of Deer Lodge County in which the location was made, was as follows:—

At about the time of the filing of the location notice in question, it seems that three forms of verification were in use in Deer Lodge County. For the sake of definition counsel call them the old form, the correct form, and the Glenn form, the latter being the form used in the notice above recited.

In the year 1878, seventy-five per cent of the notices recorded in the county were in the correct form, with twenty-five per cent divided between the old form and the Glenn; the latter being, therefore, some fraction of twenty-five per cent not stated. In February, 1879, 46 out of a total of 50 were in the old and

Glenn forms. In March there were 25 Glenn against 35 of the two others. In April one half were Glenn and old forms. In the two years, 1879 and 1880, there were 914 locations, of which 283 were Glenn, 97 old, and 534 correct form. The Glenn and old together form forty-two per cent of the whole. The Glenn alone is thirty-one per cent of the whole. Leaving out of consideration the old form, and computing the Glenn and correct form, the Glenn is thirty-three per cent of the total. From and after March, 1880, the use of the Glenn form steadily and rapidly decreased. In March the Glenn form was 27 out of a total of 60; in April, 22 out of 100; May, 11 out of 65; June, 7 out of 40; July, 2 out of 30; August, 1 out of 45; September, 2 out of 35; October, 2 out of 25; November, none. December 22d, we meet the notice in controversy, and with that the use of the form disappears from the records. For six months preceding the date of the record of the Argonaut location, the objectionable form was used 14 times in 190 location notices.

This analysis is taken from the brief of appellant, and was admitted by respondent to be correct. The District Court admitted the evidence, and upon the subject gave the following instruction: "The burden of proof is on the defendants to show that the Argonaut was a valid location; and that in making the same they complied with all that the law requires to make a valid location, as defined to you above [referring to preceding instructions]; and that such location included within its boundaries the ground in controversy. If the jury believe, from the evidence, that the defendants, or their predecessors in interest, prior to the location made by plaintiff, located the premises in controversy as the Argonaut Claim, and in the affidavit of the location failed to state the date of said location, and to verify the same, but said Argonaut Claim was in all other respects located and recorded as required by law, the court instructs you that the failure or omission to give the date of the location in the verification did not render the location invalid (the error or omission having been one of frequent or common occurrence at the time); and if the jury believe that the location of the Argonaut was, in all other respects, regular, and such as the law requires, their verdict should be for the defendants for the possession of the premises in controversy."

The verdict and judgment were for the defendants. Plaintiff appeals from the judgment. Among his exceptions saved is his objection to the admission of the above testimony as to the alleged common error, and the construction of the court in the foregoing instruction, that the alleged error was a common one at the time, and as such common error made the location notice of the Argonaut good for the purposes of the action, notwithstanding that the location notice was intrinsically fatally defective, as held in 8 Mont. 248, cited above. Respondent still insists, upon this hearing, that the location notice and verification were good, notwithstanding the decision of this court in the former appeal. This position is taken, as counsel inform the court, that they may preserve their point, in case an appeal should lie from the present decision of this court.

William Scallon, for Appellant.

A common error, or a usage or custom springing from an error, cannot contradict a rule of law, or vary a positive provision of a statute. The maxim that *communis error facit jus* (which is translated by Broom in his Legal Maxims, p. *141, as follows: "Common error sometimes passes current as law"), is sometimes invoked to sustain practices of doubtful correctness, but long continued and universally recognized, or to control the construction or interpretation of a vague statute or rule, but can have no further effect. (Broom's Legal Maxims, pp. *141, *142.) The author cites, among others, the statement of "a learned and distinguished judge," that he "hoped never to hear this rule insisted upon, because it would be to set up a misconception of the law in destruction of the law." (Bishop on Statutory Crimes, § 150, custom.) Custom in this country, he believes, would not "be accepted to the overturning of a positive rule either of the common or statutory law; for with us custom is admitted simply to supplement, not to supersede, the prior law, whether statutory or common." (*Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74.) The court in this case say: "Whatever tends to unsettle the law, and make it *different in different portions of the State*, would lead to mischievous consequences and be against public policy, and so it has been fre-

quently held." The point made in *Corn Exchange Bank v. Nassau Bank*, *supra*, that whatever tends to unsettle law and make it different in different portions of the State is against public policy, is peculiarly applicable to the case at bar; for here the proposition is, not that owing to this supposed local error, the statute should be so construed that affidavits like the one in the case at bar should be regarded all over the State, wherever made, and forever, as a sufficient compliance with the statute. (As in the case of *McKeen v. Delancy's Lessee*, 5 Cranch, 22, a case relied on by respondents, where a form of acknowledgment long accepted by the courts and bar of Pennsylvania, was for that reason approved by the United States Supreme Court against their own views.) On the contrary, the point sought to be made is, that notwithstanding the statute, within a circumscribed portion of the State, and for a limited period, namely, in Deer Lodge County, and for a year or two, such affidavits should be held sufficient, but that at any other time since then or elsewhere, they may not be. In other words, to temporarily repeal, suspend, or alter the statute for the benefit of a small number of people in Deer Lodge County, is what the court is asked to do. In *McBurney v. Berry*, 5 Mont. 300, a case from Jefferson County, decided in January, 1885, a notice of location was held invalid by reason of a defective affidavit; and in that case, as well as in the opinion of the first appeal in the case at bar, the statute was held imperative. But if the contention of the respondents should obtain, nothing would prevent proving local errors in each county in the State, and thereby making the law different in each county. For the definition and requisites of a custom and its effects, see 1 Bouvier's Institutes, page 28, section 121; page 594, section 2206. (An analysis of the figures showing the extent of the custom in the case at bar, taken from the brief of appellant, is found in the statement of facts by the court. — REPORTER.) If it be urged that to reject this notice would perhaps destroy the validity of many claims, we say that there is nothing to show that any number of such claims still rest upon the original locations; and it is but fair to presume that most of them have either been patented or relocated, or that the original locations have been corrected. And within the nine years or more which have followed the disuse of this

form there was certainly time to either patent all such claims, or to correct the original locations. "The law assists those who are vigilant, not those who sleep on their rights." The question whether or not there existed in fact a common error or custom, as claimed, was a question of fact for the jury. The *validity* of the so-called usage was for the court, its *existence and extent* for the jury. (1 Thompson on Trials, § 1058.) In *Hauswirth v. Butcher*, 4 Mont. 299, an affidavit such as designated herein, the *old form* was held good. This rule ought not to be extended so as to give effect to each new error which may arise.

John F. Forbis, for Respondents.

The appellant mistakes the position of the respondents, when it is asserted that the respondents rely upon a custom or usage, whereby insufficient location notices became sufficient by reason of such custom or usage. There is, as we conceive, a vast difference between the principles of law governing custom and usage, and that applicable to the maxim *communis error facit jus*. The first, according to all authorities, must be immemorial, universal, compulsory, continued, certain, and not contrary to the common or statute law. The other has none of these characteristics, but on the contrary is neither immemorial, universal, compulsory, continued, nor certain, and is contrary to the letter of the law. The maxim clearly indicates that it is not a custom or usage in the legal sense, but is exactly what neither custom nor usage is, an error in construction of law. One which, however, the courts believe it better to overlook than to enforce the strict letter of the law. As we understand the maxim we invoke it is this: The law has prescribed certain formalities, which are mandatory and must be followed. No one individual may disregard the mandate. However, by a common error of construction, the law has been often, but not universally misconstrued in certain localities, and the title to much property has come to depend upon the misconception. Under such circumstances the courts, when attention is called to the facts, decide that they, for the general good, will give the same construction to the law that had been commonly given to it by those who had, not judicially but by practice, construed it

before them. The maxim constitutes rather a rule of construction of a statute than the establishment of a custom or usage. The law is not disregarded, but given a construction which the courts would not give it but for the fact of the erroneous construction generally given it theretofore. We have found no definition of what constitutes this common error in all of its details, but from the authorities discussing the question we think the following rules may be deduced: 1st. An error must have arisen in the construction of statute law. 2d. The error must consist in the construction of the formal requirements of the law; such as the attestation, verification, or acknowledgment of legal instruments. 3d. The purpose of the law must not be overthrown or its spirit violated. 4th. Vested rights to a large extent must depend upon maintaining the erroneous construction. 5th. The error must be frequent or general, but need not be universal, and may be confined to a particular locality or community. If these are the rules governing the application of the maxim, then the case at bar meets each and every requirement. In support of our position we cite, *Hauswirth v. Butcher*, 4 Mont. 299; *McKeen v. Delancy's Lessee*, 5 Cranch, 22; *Panaud v. Jones*, 1 Cal. 488, 499, 500; *In the Matter of the Will of Warfield*, 22 Cal. 51-71. If, therefore, the whole question involves the construction of law (and surely nothing else is involved), then the whole matter is one for the consideration of the court and not for the jury. It is not for the jury to construe law or to receive information throwing light upon its construction. Consequently the evidence was properly submitted to the court. It is also objected that the evidence received was not legal evidence, and consequently the court erred in receiving it. The court is not required to seek legal evidence for its information. If the court had seen fit to do so, it might well have investigated the facts, and obtained information directly from the records, or by secondary or any other evidence, which would have satisfied the judicial mind. This the court did in *McKeen v. Delancy's Lessee*, *supra*. In that case the Supreme Court of the United States took statements of counsel before the bar, and construed the law contrary to its letter, because it was necessary to make such a construction in order to sustain titles to large amounts of property. In the

case at bar it was almost an impossibility to produce legal evidence of the records of Deer Lodge County. The records themselves could not be produced, and to require certified copies to be introduced in evidence would have been a denial of justice, as the expense would probably involve more than the value in litigation. The court in view of the circumstances resorted to the best information within its reach. This it had a perfect right to do. None of the decisions hold that the error must be universal. We respectfully submit that the verification in this case was sufficient. It is true that the Supreme Court of the Territory held otherwise. But we think the reasoning of the Supreme Court faulty; that the opinion is wrong in principle; and that this court would be justified in overruling that opinion. The laws of Montana do not require the record to state the names of the locators or the date of the location, but only the description with reference to some natural object or permanent monument. It does not require an oath to a declaration giving the names of the locators and the date of location. But it does require a verified declaration, "describing such claim in the manner provided by the laws of the United States." That this claim was described as provided by the laws of the United States is not disputed, and the oath to the declaration gives a correct description of the claim by metes and bounds, and also says that the description contained in the declaration itself is true. It would seem that there could be no question as to the sufficiency of the oath to the declaration, if the law is to be construed as meaning what it says. But the Supreme Court of the Territory in passing upon this oath (*O'Donnell v. Glenn*, 8 Mont. 248) seem to seek some opportunity to declare this location notice void, rather than give it a reasonable construction and sustain it. In that opinion the court holds that the notice and oath are sufficient in every respect, except that the oath does not give the date of location.

DE WITT, J.—The sufficiency of the location notice of the Argonaut Claim is no longer an open question in this case. It was decided to be invalid on the former appeal. (8 Mont. 248.) That decision is now the law of this case. The other consideration is whether the common error sought to be proved and

relied upon by defendants was, in fact, a common error, and whether, as such, it was of a nature to make good, for the purposes of the action, the defective location notice. The District Court held that both the existence and effect of a common error of this sort is a question for the court and not the jury. The matter is one of mixed law and fact. In the application of the maxim *communis error facit jus*, the inquiry is whether "the law is made." If the fact of the existence of a common error is to be submitted to the jury, and the jury finds its existence, then the court has no province but to complete the maxim and say, *facit jus*. But that is the very question for a court, that is to say, "what is the law." The court must say what the "law has been made," whether by a common error, or by a legislature. We are, therefore, of opinion that the lower court was correct in holding that both the existence and effect of the alleged common error was for the court and not for the jury. To hold otherwise would be to make the jury the judges of the law. (See *McKeen v. Delancy's Lessee*, 5 Cranch, 22, and cases cited below.)

We will now endeavor to determine whether the court erred in its decision, that such a common error existed as should be held to make the law that the controverted location notice was good for the purposes of the case on trial. The application of the maxim under consideration, like that of all concrete generalizations, is attended with difficulty and danger. A review of the authorities leads us to the conclusion that each case of the invocation of the rule must stand largely upon its own facts. In Coke upon Littleton, we find that the learned author often prefaces the announcement of a legal principle with the words "it is commonly said." By these words we understand is meant, "it is commonly the legal opinion." To the expression cited, Littleton adds: "That is, it is the common opinion, and *communis opinio* is of good authority in law. *A communi observantia non est recedendum*;" which we may read, "there must not be a departure from a common or general observation or practice." The annotator to Coke upon Littleton adds, at this point: "Other rules immediately connected with this are, *communis error facit jus*, and *res judicata pro veritate habetur*, and *minime mutanda sunt, quæ certam interpretationem habuerunt*." The two latter

may, perhaps, be well rendered, "an adjudicated matter shall be deemed to be correct," and "those matters shall be least changed which have attained a certain interpretation." The language of these maxims carries the idea of an observance, an interpretation, a construction, and to some extent, a judicial one at that, as evidenced by the words, *observantia*, *res judicata*, and *interpretationem*.

Thus we find our maxim under purview at an early day, in company with language tending to the view that the common error that makes the law is an error in the observing, the construing, the interpreting law, and not an error in totally disregarding, and in practice, repealing a positive statute; and furthermore, that the error is general, and not confined to a portion of one class of the inhabitants of one geographical or political division of the jurisdiction, as was the case with the error being considered, which was confined to thirty-three per cent of the prospectors of the county of Deer Lodge, of the Territory of Montana. In the year 1764, the Supreme Court of Pennsylvania say: "These deeds, and this mode of examination of *femmes covert*, on conveying their estates, have generally prevailed in this province from its first settlement, and undergone from time to time the notice of the courts of justice; it would be very mischievous now to overturn them. The maxim *communis error facit jus* cannot operate more properly than in this case." (*Davey v. Turner*, 1 Dall. 14.) Here a general practice had received tacit judicial approval for years. The same court, in 1768, apply the maxim to a "constant usage," the individual instance of which having occurred forty-one years prior to the controversy before the court. (*Lloyd v. Taylor*, 1 Dall. 17.) The Supreme Court of the United States, in 1809, apply and discuss the doctrine. Says Mr. Chief Justice Marshall: "The first question which presents itself in this case is, was this deed properly proved? Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be that the deed was not regularly proved. A justice of the Supreme Court would not be deemed a justice of the county, and the decision would be that the deed was not properly proved, and therefore not legally recorded. But in construing the statutes of a State on which land titles depend, infinite mischief would

ensue, should this court observe a different rule from that which has long been established in the State; and in this case the court cannot doubt that the courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act. It is of some weight that this deed was acknowledged by the chief justice, who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another judge of the Supreme Court. It is also recollected that the gentlemen of the bar, who supported the conveyance, spoke positively as to the universal understanding of the State on this point, and that those who controverted the usage on other points did not controvert it on this. But what is decisive with the court is, that the judge who presides in the Circuit Court for the district of Pennsylvania reports to us that this construction was universally received." (*McKeen v. Delancy's Lessee*, 5 Cranch, 22.) In this case there was a "universal understanding in the State"; and the learned Chief Justice refers to the judicial and professional construction in the State. In *McFerran v. Powers*, 1 Serg. & R. 101, the same question was before the Supreme Court of the State of Pennsylvania, and was decided upon the authority of the case last above cited. And here again, we find the idea of a universal and judicial or professional construction.

In the Supreme Court of the United States, in 1803, in the case of *Stuart v. Laird*, 1 Cranch, 309, the court, Patterson, J., says: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." This case is another instance of the universal and judicial character of the error. (See, also, *Green v. Neal's Lessee*, 6 Peters, 291, which reviews many of the cases.)

The Supreme Court of Massachusetts say, in *Rogers v. Goodwin*, 2 Mass. 477: "Of these statutes a practical construction early and generally obtained, that in the power to dispose of lands was included a power to sell and convey the common lands.

Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the court now to decide that this construction is not to be supported, very great mischief would follow. . . . We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of the words."

We cite Mr. Justice Blackburn as follows, in *Reg. v. Justices of Sussex*, 2 Best & Smith, 664: "I think, also, that there are cases in which a mistaken notion of the law has, no matter why, become so generally accepted, and been so acted upon, as to render it probable that business has been regulated, and the position of parties altered in consequence, and in such cases we may hold that the general acceptance of the mistake has made that law which was originally error. *Communis error facit jus*; but then, I think, that before we act upon this principle, we ought to see it clearly made out that the error has been commonly accepted, and that the nature of the case is such that parties are likely to have acted upon the mistake and so altered their rights and position."

Lord Brougham, chancellor, says, in *Devaynes v. Noble*, 2 Russ. & M. 495: "If it be true that even a prevailing error, what is called a common or a universal error, may be said to make the law, this at least may be allowed to be a sound foundation of the doctrine I am referring to, namely, that unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse an individual case by way of correcting a slight error, if that error has been acted upon for a long series of years, than to leave it as it stands; more especially if the opinions of lawyers and the decisions of judges have been ruled by it, and if, upon the analogies of that case, the same principle has been recognized and adopted in other cases connected with and relating to it." The learned chancellor above calls a common error a universal error, and speaks of the opinions of lawyers and the decisions

of judges being ruled by it. *In the Matter of the Will of Warfield*, 22 Cal. 71, the court says: "Courts feel themselves constrained to uphold, where it is possible, contemporaneous interpretation of statutes, under which interpretation rights of property have for many years been acquired." In the case of *Panaud v. Jones*, 1 Cal. 498, the court cites with approval a Spanish authority, Escriche's *Derecho Español*, as follows: "Legitimate custom acquires the force of law, not only when there is no law to the contrary, but, also, when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. Hence it is said, that there may be a custom without law, in opposition to law, and according to law."

Counsel for respondents has urged this opinion in his argument. We hesitate to adopt the views therein contained, however, to the extent that a common error can have the effect to abrogate a positive statute, except under most extraordinary circumstances, of which we now have no knowledge. The California decision was made in the earliest history of the jurisprudence of that State, when it had just fallen heir to much that was Spanish, and along with the rest, perhaps, some customs that were not so valuable as other portions of the inheritance. We have reviewed some of the leading cases in which the maxim under consideration has been discussed and applied, with the view of discovering what the current opinion would be as to the facts in the case at bar. (See, also, the cases cited in the foregoing authorities; and also Broom's *Legal Maxims*, p. *141; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; *Hazard v. Martin*, 2 Vt. 77.) •

It is not possible to deduce from the authorities inflexible rules governing the practical scope of the maxim, *communis error facit jus*. The decisions tend, however, toward a few general principles, each of which principles has at some time been invoked in some case, but not all of them, perhaps, in the same case. In every case we find some of them applied, while in some cases some of them may be disregarded. We cannot lay down rules, any one of which would be decisive of every case. But we state the following principles, with the suggestion that if an individual case fell within the purview of all of them,

there would be no difficulty with the maxim, and that in proportion as the facts of a case depart from the principles announced, the difficulty of application is increased. Every case depends upon its own facts. The rules as we conceive them to be, rules flexible in their nature, and subject to the qualifications above suggested, are:—

1. The common error must be one having some judicial or professional recognition, approved or tolerated by decisions of judges or opinions of lawyers, or to put the rule less positively, such judicial or professional recognition adds to the law-making force of the common error. We further qualify the rule, in this, that common error may possibly have the law-making power, when supported by lay opinion only, provided that other rules may be forcibly applied.

2. Courts will not lightly or inconsiderately allow a common error to subvert a rule of law or abrogate a positive statute.

3. The error must be a universal or very general one. The nearer universal, the more forcibly will it address itself, as a law-maker, to the approval of courts.

4. The acquiescence in the common error has involved, or there depends upon it large property interests.

5. The error must be one that people have relied and acted upon, and have fixed their rights and positions thereby.

6. The longer the error has existed the greater force it has.

7. The error must be clearly proved.

8. The error must be one in the observing, construing, or interpreting law, and not an error in directly disobeying and abrogating that which is law.

We have called the above suggestions "rules"; but the word "rules" must be received with the limitations above laid down. If the facts in the case at bar met the requirements of all these rules, or if they fell fairly within them, we should affirm the judgment below. But let us examine the facts in the order in which we have stated the rules.

1. The alleged common error in the location notice in question never received approval or toleration by judicial decision or legal opinion. The form of verification was adopted simply by a few prospectors in a part of the Territory, without any assurance from any source that it was correct.

2. The United States and territorial laws as to the requirements of a location notice, as construed in 8 Mont. 248, are peremptory. We hesitate to admit that thirty-three per cent of the mining locators of one county of a vast Territory can, by their own unauthorized practice, abrogate, repeal, and nullify a positive law.

3. So far from the error being general or universal among the people, it was limited to a very small number.

4. It is not shown that large property interests depend upon the upholding of this location notice. Only 283 of these notices are found, and these all in two years. This was ten years ago. In the history of mining prospecting, ten years will see the valuable mines patented and the others abandoned or relocated. They are, in either instance, beyond the necessity of relying upon the defective location notice.

5. It does not appear that any considerable number of persons have relied upon, or sought to fix their rights upon, the alleged common error.

6. The error existed but a short time. It attained its height months before the location of defendants. From March, 1880, it rapidly waned into desuetude, and disappeared with the defendants' location December 22d.

7. The error was clearly enough proved, so far as it went.

8. The error did not consist in any effort to observe, construe, or interpret the law of Congress or the Territory. It was rather a direct disobedience of those laws. To construe or interpret a statute is to read it for the purpose of ascertaining its meaning and effect. He cannot be said to construe or interpret who clearly disregards the law. That is not construing. It is refusing to do so. It is defying the law.

We arrive at the opinion that the facts in the case at bar are almost wholly in conflict with all the principles governing the application of *communis error facit jus*.

The District Court erred in instruction No. 3, recited above, upon the subject of common error. The action of the court in this matter of the alleged common error was objected to, and exception saved in other manner as well as in the instruction referred to.

The judgment is reversed, and the case remanded for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

9	468
11	159

9	468
16	64
17	521

9	468
424	512
9	468
28	15

BLUE BIRD MINING COMPANY (LIMITED), APPELLANT, v. MURRAY ET AL., RESPONDENTS.

ORDER FOR INSPECTION AND SURVEY — Equity jurisdiction — Injunction — Judicial discretion. — In the case at bar the plaintiff, in following its vein in the dip and beyond the side lines of its claim, had been working within the limits of defendants' claims. An injunction had been granted restraining the defendants from working upon the mining claim of plaintiff, and afterwards an order was granted upon defendants' motion, permitting them to prosecute certain specified work within the boundaries of their own claim under certain restrictions and the control of the court, for the purpose of obtaining evidence for the trial of the case, and the ascertainment and determination of the rights of the parties, and the continuity and identity of the veins in question, and to prosecute development and other work pending the litigation. *Held*, that the granting of the order was within the equity powers of the District Court, and being in effect an order for an inspection and survey for the discovery of the truth, was not an abuse of judicial discretion. (Case of *St. Louis M. & M. Co. v. Mont. Co. ante*, p. 288, affirmed.)

INJUNCTION — Appealable orders — Bills of exception. — An order which modifies, and thereby partially dissolves an injunction, is appealable, and may be reviewed upon the papers used on the hearing in the court below properly certified, and no bill of exceptions is necessary. (Cases of *Granite Mountain M. Co. v. Weinstein*, 7 Mont. 346; *Vaughn v. Dawes*, 7 Mont. 360, affirmed.)

INJUNCTION. — The granting or refusal of an injunction is a matter of discretion in the court below. (Cases of *Nelson v. O'Neal*, 1 Mont. 284; *Atchison v. Peterson*, 1 Mont. 570, cited.)

Appeal from Second Judicial District, Silver Bow County.

The order modifying the injunction was granted by McHATTON, J.

M. Kirkpatrick, and *John F. Forbis*, for Appellant.

We are at a loss to name the order made, and from which the appeal is taken. It certainly is not an order dissolving an injunction, nor so far as we can understand it, an order that has any reference to the granting or dissolution of an injunction. However, as it was granted in a proceeding in which an injunction had been previously granted, we surmise that it is claimed to be an order modifying the injunction. That the order is unprecedented, we may assert, we think, from the fact that there is no record of any such order having ever been granted before. We take the position that the judge had no power to make the order; that it is absolutely without authority of law, and therefore void; that it was made in violation of every principle that underlies the right of the enjoyment of one's property; that possession of

property is a right in itself, and that the court or judge was absolutely without power to dispossess one without a due process of law, which means a final judgment; and that if he had no power to dispossess one, he has no power to order another one into the possession, or to order one to share his possession with another. The plaintiff is within the limits of the defendants' ground; that is not disputed, but it claims that it has a right there; that where it has worked it has a right to be, and as a necessary consequence that the defendants have no right to be. And yet, notwithstanding the facts, the court ordered the defendants to be let into the plaintiff's possession, not for inspection only, but that the defendants might continue the work which plaintiff has begun. This was done upon an *ex parte* hearing, and we claim altogether erroneously. We contend that to sustain this order would be to deprive the plaintiff of its property, and summarily, and without reason or justice, to compel the plaintiff to put its improvements and entire outlay at the disposal of the defendants, in order that defendants might use them, if they might be so used, to defeat the very ends for which plaintiff intended them. Defendants contend that they only ask for a right of way, and this they say the law of Congress gives them. But we contend that the law of Congress gives to no one the right of way through another's works, to use and occupy the same. We do not object to the defendants having a right of way wherever they may wish through the Blue Bird vein, but we certainly do insist that they have no right to monopolize, or even share the workings made by this plaintiff, until they can obtain a judgment of a competent court giving them such right. And the order herein appealed from is not such a judgment. As we have said, there are no adjudications upon a question like the one in this case. However, as we conceive, a like principle is decided in *Brennan v. Gaston*, 17 Cal. 375.

William Scallon, for Respondents.

Respondents contend that the order is not an appealable one. The right of appeal is regulated by sections 421 and 444 of the Code of Civil Procedure. No appeal lies unless allowed by the Code. (*Rader v. Nottingham*, 2 Mont. 157.) The order in ques-

tion is not one of those mentioned in the sections. Appellant's counsel say they cannot name the order. If not, it cannot be one of those named in the sections cited. If the order were appealable, the court could not entertain the appeal, because there was no bill of exceptions in the case, and no certificate identifying the papers used, and therefore, nothing properly can come before the court on which it can legally pass. The motion appears to have been based on affidavits, maps, etc., and on pleadings and orders in another case, produced on the hearing, but not part of the files or record of this suit. A bill of exceptions was therefore necessary. There is no proper certificate or anything else to identify the papers used below, or the grounds upon which the court acted. (*Barber v. Briscoe*, 8 Mont. 214.) The order was not made *ex parte*, but after full hearing of all parties. The court has jurisdiction—complete jurisdiction and control over the ground. In each case there is an equitable action for an injunction joined to a legal one and an injunction granted. Appellant contends that the order deprives it of its property. It admits that it was inside of defendants' lines, but claims to be following a vein downward. As if a mere claim made a right! The presumption of law is that the defendants own everything inside of their lines until the contrary be shown. *Prima facie*, appellant is a trespasser. (*Cheesman v. Shreve*, 37 Fed. Rep. 36.) Appellant misstates respondents' position. The intention is not to "continue work which appellant has begun," but to do development work, which the appellant is not doing and does not intend to do, so far as known. No interference would be had with appellant's system of development so as to prevent it from carrying it out. The improvements and outlay of appellant are not put at the disposal of respondents. The latter simply get the right of way through the openings—some in the contested territory or vein, and some in the uncontested territory, the country rock, all in defendants' lines. The principles underlying the order are: That the law requires the best evidence; that the court in this instance has already control over the property; that where a showing is made that work to be done in the disputed territory will disclose the facts and the truth, and particularly where the existence of controlling facts is asserted and denied, and it appears that the question can be

determined by the doing of work, courts, and especially courts of equity, having jurisdiction and control over the ground, have the power, and ought to order such work done; and on principle and in fact, such order does not differ from an order for inspection, with right to remove obstructions and make new openings. Precedents of such orders are found in the following cases: *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Thornburgh v. Savage Min. Co.* 7 Morrison Min. Rep. 667; *Earl of Lonsdale v. Curwen*, 3 Bligh, 168; 7 Morrison Min. Rep. 693; *Bennett v. Griffiths*, 30 Law J. Q. B. 98; 7 Morrison Min. Rep. 26. Bainbridge on Mines and Minerals, page 512, states that "such an order was obtained to enable persons to repair and ventilate the mine in order to see the extent of coal taken." Now we submit that if such orders are proper to determine the quantity of minerals taken, they are more so where the purpose is to ascertain the very right to the minerals. But appellant claims such an order is absolutely void. Once the abstract power admitted, the time, manner, and conditions are questions of judicial discretion. The case cited by appellant is not in point. There was an attempt to oust a party *absolutely* and compel him to deliver possession by an *ex parte* order of a judge at chambers, not for the purpose of the preparation of the case, but *absolutely*. Here the order is merely for leave to do certain work, under the control and reserved supervision of the court, to prepare for trial.

BLAKE, C. J.—The Blue Bird Mining Company (Limited) is a corporation, organized under the laws of the Territory of Montana, and owns the Blue Bird Lode Mining Claim, which is situated in the county of Silver Bow. Murray *et al.* own, or possess as lessees, the Darling, Little Darling, and Lena K. Lode Mining claims, which are south of and, viewed as a whole, adjoin the property of the company. It is conceded that the company, asserting the right to follow its vein in the dip and beyond the side lines of the Blue Bird Lode Mining Claim as located, has been working at places which are within the limits of the claims of Murray *et al.* It is maintained by Murray *et al.* that this under-ground development is not upon the property of the company, and the parties have resorted to the courts for legal and equitable relief. At the commencement of the action

of the company against Murray *et al.*, the court granted an injunction, enjoining Murray *et al.* from working upon the Blue Bird Lode Mining Claim, and afterwards, upon a hearing, ordered that the same be continued in force pending the litigation. A motion was then filed by Murray *et al.*, and supported by affidavits, applying for permission to prosecute certain work, and after a hearing an order was made March 29, 1890, which is before us for review.

The application alleges that "it is necessary to the preparation of this case for trial, and to the ascertainment and determination of the exact rights of the parties, and to the continuity and identity of the veins in question in this case, or the absence thereof, to prosecute development work, and particularly work hereinafter mentioned; and . . . an injunction has heretofore been issued in this case against the defendants; and . . . the plaintiff has refused its consent to the prosecution of the work hereinafter mentioned." Accurate descriptions are given of the cross-cuts, shafts, winzes, lagging, and levels, which are to be the subjects of further labor, and the object thereof is distinctly pointed out. While the general nature of this development has been stated in the application, some definite specifications are cited to show the reasons for this order. "*Fourth.* To run east on the level known as the two-hundred-foot level of the Little Darling to the east end line of the claim, through the openings made by the Blue Bird Company, and particularly the floor or drift known as the Foley drift, thus named after the man who last worked there for the Blue Bird Company. (The intention is here to extend said drift beyond the point where the Blue Bird Company left off, in order to determine whether or not any vein shows beyond said point.) . . . *Sixth.* To open up the lagging which now closes up the connection made by the Blue Bird Company between levels Nos. 4 and 5, and which connection is made from the winze last mentioned, and an incline from the bottom thereof, and a raise from the five-hundred-foot level. (This being a connection or cross-cut recently made by the Blue Bird Company, and immediately lagged up by it, so that these defendants had no opportunity to examine the same; and the importance of which is shown in the affidavits filed in support thereof.)"

The conditions which are set forth in the order appealed from should be considered. “*Provided, however,* that all of the above-described work shall be done by the said defendants, at their own cost; and all dirt, debris, and ores shall be raised through their own shaft, except that, if the plaintiff so desires, it may itself take, raise, and hold, until the final determination of this suit, any ores which may be extracted from the vein shown on No. 4 level, or from any vein which may be encountered north thereof, or from the winze on No. 4 level. And except, also, that if plaintiff desires it, the opening of the lagging in the connection between levels No. 4 and No. 5 may be done by plaintiff, or under plaintiff’s supervision; *provided,* full liberty be allowed defendants to examine the same; and *provided, further,* that in the examination of said cross-cut connection between levels 4 and 5, and the cross-cut from No. 4 south, nothing more be done than is necessary for the examination thereof, and the ascertainment of the nature of the ground, or the formation through which the same are run; that if these matters can be determined without the removal or opening of any of the timbering, or by digging in the bottom thereof, then it shall be done accordingly. And it is further ordered that, for the purpose of doing the foregoing work and inspection, the defendants, and all persons employed by them, have a right of way through any openings, levels, and cross-cuts made by the Blue Bird Company within the lines of the Little Darling Claim. . . . And *provided, also,* that the work, and particularly the inspection, shall be done in such a manner as not to endanger any of the present workings or openings; and that said connection between levels 4 and 5 and the cross-cut south from the Blue Bird shaft shall be left or replaced in the same condition that the same now are or may be at the time immediately prior to the inspection; and it is *further provided,* that any and all work done by the defendants by virtue hereof must be done in good workmanlike and mine fashion, and timbered in best mining fashion; and that these defendants, or such thereof as shall cause said work to be done, shall be in no manner relieved from liability for the doing of said work, or the manner in which it is done by this order; but that the same liability shall attach to them on account of such work as would

attach if done without this order, in case the ground or veins in which the same may be done be found or determined to belong to the plaintiff; and it is *also further provided*, that, in order to prevent any collision or interference between cars or other instruments of transportation of the ores or debris, that the defendants shall furnish, at their own expense, all necessary signal-men to warn the men employed by either party of the approach of cars, etc.; and the court reserves jurisdiction over the matter of this order for the purpose of seeing that it is carried out according to its spirit, and in proper manner; and *provided, further*, that nothing in this order contained shall authorize the defendants, or any of them, to go outside of the boundaries of their own claims."

The respondents move to dismiss this appeal for the following reasons, to wit: "(1) That this court has no jurisdiction of the appeal or case. (2) That the order sought to be appealed from is not appealable. (3) That no exception was taken, or appears to have been taken to said order, and that there is no bill of exceptions thereto in the record, and that none was taken or filed, or appears to have been taken or filed."

The notice of appeal states that the plaintiff appeals "from the order made and entered in the above-entitled cause whereby said judge, upon the application of the defendants, modified the injunction granted in this case against the defendants, and permitted defendants to prosecute certain work in the workings of plaintiff, and from the whole and every part of said order."

The Code of Civil Procedure provides that "an appeal may be taken from an order to grant or dissolve an injunction" (§ 421), and "from an order granting or dissolving an injunction." (§ 444.) The order of injunction obtained by the appellant restrained Murray *et al.* from working upon the property, which it described as the Blue Bird Lode Mining Claim. The court in making the order under examination modified and thereby partially dissolved the original injunction by authorizing work within certain restrictions to be done. In *Hunt v. Steese*, 75 Cal. 626, the court says: "Motions for injunction are regularly heard upon complaint, answer, and affidavits, and no bill of exceptions is necessary, unless it be to identify the papers

used on the hearing in the court below." The provisions of the Code of Civil Procedure of this State are similar to those of the Code of California, and we have adhered to the same rule. (*Granite M. M. Co. v. Weinstein*, 7 Mont. 346; *Vaughn v. Dawes*, 7 Mont. 360.) The necessary papers have been properly certified, and the motion to dismiss the appeal must be overruled. (See, also, *Hefflon v. Bowers*, 72 Cal. 270.)

The contention of the appellant is that the court had no authority to make the order; that it is unprecedented, and deprives the Blue Bird Mining Company (Limited) of the possession of its property, without due process of law. The counsel for the appellant in their brief say: "The plaintiff is within the limits of the defendants' ground; that is not disputed, but it claims it has a right there; that where it has worked it has a right to be, and as a necessary consequence that the defendants have no right to be." How does this concession affect the relations of the parties? In *Cheesman v. Shreve*, 37 Fed. Rep. 36, Mr. Justice Brewer says: "These defendants are entering beneath the surface, within the side lines of ground patented to complainants, and seeking to mine and take ore therefrom. *Prima facie* they are trespassers. They justify this entrance under authority of the laws of the United States, and especially section 2322 of the Revised Statutes, which give to the owner of a vein, lode, or ledge, the top or apex of which lies within the surface lines of his own location, the right to follow that vein downward, outside of the side lines of his location, and into territory whose surface belongs to another. . . . So the defendants are entering within the side lines of complainant's property. *Prima facie* they are trespassers; and where the affidavits, upon an application for a preliminary injunction, are conflicting, the rule is to preserve the possession as against such *prima facie* trespassers by a preliminary injunction, leaving the question of title to the property to be established by a suit at law."

The granting or refusal of an injunction is a matter of discretion in the court below, and this rule was recognized at an early period in the courts of Montana. (*Nelson v. O'Neal*, 1 Mont. 284; *Atchison v. Peterson*, 1 Mont. 570; *Hicks v. Michael*, 15 Cal. 107; *Hicks v. Compton*, 18 Cal. 206; *De Godey v. Godey*, 39 Cal. 167; *Rogers v. Tennant*, 45 Cal. 186; *Hiller v. Collins*,

63 Cal. 238.) The question to be decided is whether there has been an abuse of judicial discretion.

In *St. Louis M. & M. Co. v. Montana Company (Limited)*, ante, p. 288, this court reviewed the English and American authorities upon the right of parties interested in mines to have an inspection and survey under the laws of the State. We arrived at the conclusion that the source of these statutory provisions was the chancery practice of England, and, avoiding repetition, we will say that most of the cases cited in the opinion relate to orders which were made by virtue of equitable jurisdiction. Under the Constitution, "the District Courts shall have original jurisdiction in all cases at law and in equity, including all cases which involve the title or right of possession of real property. . . ." (Art. viii. § 11.) Independent of the statute upon the subject, we think that the court below, by virtue of its equity powers, could authorize the inspection and survey of the premises in controversy upon the motion of any party to the action. It was also maintained in *St. Louis M. & M. Co. v. Montana Company (Limited)*, that the object of these proceedings was to obtain the best evidence for the trial, and that no constitutional rights of the owner of the property to be viewed had been infringed, although there would be an interference with its possession. The appellant admits that it is willing that the respondents shall have all the privileges essential to an inspection and survey of its vein and works, but denies the power of the court to allow any work to be done thereon. The books seem to be destitute of precedents. The court is preserving the property pending the litigation, and the sole purpose of the order permitting any development by the respondents is to ascertain the facts, if possible. The appellant, according to *Cheesman v. Shreve, supra*, is *prima facie* a trespasser, and therefore the respondents are *prima facie* in the rightful occupancy of the levels, shafts, winzes, and cross-cuts, which are described. The respondents submit with their brief certified copies of five orders, which have been made in controversies relating to lode mining claims by the Circuit Court of the United States for the District of Colorado. They contain all the features of which the appellant complains as obnoxious. Viewing the order as the best means of discovering the truth, and having the practi-

cal effect of an inspection and survey, and considering the actual condition of the property, we are unable to hold that the court below has abused its discretion.

It is therefore adjudged that the order be affirmed with costs.

HARWOOD, J., and DE WITT, J., concur.

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11	60
11	61

KLEINSCHMIDT, APPELLANT, v. KLEINSCHMIDT, RESPONDENT.

ABSOLUTE SALE OR MORTGAGE — Admissions in pleadings. — In an action to have a deed declared a mortgage the answer specifically denied all of the material allegations of the complaint, and alleged an agreement that an indebtedness of the plaintiffs and another and future indebtedness to be contracted by them should become an additional claim against the interest of the plaintiffs in the premises conveyed by such deed, unless the terms and conditions of a certain bond, executed by the defendants to the plaintiffs for a reconveyance of the property, was complied with. Plaintiffs moved for judgment on the pleadings upon the ground that the agreement set forth in the answer was a confession that the transaction constituted a mortgage. *Held*, that the motion was properly denied, the question as to whether, in the intent of the parties, the transaction was a mortgage or a sale being one to be decided by the evidence.

SPECIFIC PERFORMANCE — Bond to reconvey property. — A bond in the penal sum of five thousand five hundred dollars, in which the obligors covenant that if the obligees pay them five thousand five hundred dollars and interest, and if they, the obligors, do not make, execute, and deliver a deed of certain property, then the bond shall be in full force, otherwise to be null, cannot be specifically enforced so as to compel a conveyance of the property described therein upon a tender of the money, as the obligors could discharge the bond by accepting the tender of five thousand five hundred dollars and interest and then paying the penal sum of five thousand five hundred dollars to the obligees.

CONVEYANCE OF REALTY — Bond to reconvey. — A conveyance of realty for a consideration which is the full value of the property, where the vendees executed to the vendors a bond to reconvey such property, the papers showing an absolute conveyance, is, in the absence of evidence tending to show that a mortgage was intended, an absolute sale, with an independent privilege to repurchase upon a compliance with the terms of the bond. (*Gasser v. Bogk*, 7 Mont. 583, affirmed.)

Appeal from First Judicial District, Lewis and Clarke County.

The cause was tried before HUNT, J., without a jury.

Statement of the case, prepared by the judge who delivered the opinion.

The complaint in this case was filed September 7, 1888. It alleges that the plaintiffs were the owners and seised in fee of

the premises in controversy, describing them by metes and bounds; that being so seised, on the fourteenth day of May, 1884, plaintiffs executed and delivered to defendants a warranty deed of the premises; that said conveyance, although in form a warranty deed, was, in fact, a mortgage, and was made and intended by all the parties to secure the repayment to the defendants of the sum of five thousand five hundred dollars, which sum the defendants on said day loaned to the plaintiff, Carl Kleinschmidt; that on the same day and as part of the transaction, the defendants executed and delivered to the plaintiffs a writing obligatory in the penal sum of five thousand five hundred dollars, conditioned that they would, on or before the first day of August, 1886, reconvey to the plaintiffs said premises on payment by the plaintiffs to defendants of said sum of five thousand five hundred dollars, with interest from May 14, 1884, at the rate of ten per cent per annum. The complaint further alleges a tender of said sum on August 1, 1886, to the defendants, and refusal of said tender by defendants.

The prayer of the complaint is: *First*, that the plaintiffs be allowed to redeem said lands from said mortgage upon paying to the defendants the amount due thereon. *Second*, that upon such payment the defendants reconvey to the plaintiffs by good and sufficient warranty deed all and singular the aforesaid lands. *Third*, that the plaintiffs recover their costs herein, and that they have such other and further relief in the premises as to this court may seem meet and equitable.

The answer is, *first*, a specific denial of all the material allegations of the complaint, admitting, however, the making of the deed named in the complaint, but denying that it was intended as a mortgage. The answer further alleges that the defendants paid plaintiffs for said premises with their promissory note for five thousand five hundred dollars, payable on or before August 1, 1886, with interest at ten per cent; that in addition to the provisions of the bond named in the complaint, it was further agreed that the plaintiff, Carl Kleinschmidt, might return said promissory note to the defendants on or before August 1, 1886, and if so returned defendants would redeed said premises. In case of the failure of the plaintiff to return said note or pay said amount on or before August 1, 1886, plaintiffs should lose all

right and claim upon said premises. The answer further alleges that the plaintiffs failed to comply with the terms of their agreement on August 1, 1886; that the plaintiff, Carl Kleinschmidt, negotiated said note shortly after obtaining possession of it; that he has never returned said note or tendered said money; that the defendants have been in possession of the premises ever since May 14, 1884; that the plaintiff, Carl Kleinschmidt, and the Blackfoot Horse and Cattle Company were also indebted to the defendants at the time of this transfer, and it was agreed that this indebtedness, and the indebtedness to be contracted by said Carl Kleinschmidt and said cattle company, should become an additional claim against any interest of the plaintiffs in the premises, but that unless plaintiffs complied with the terms and conditions of the bond, and delivered up the note, as above set forth, then plaintiffs ceased to have any interest in or to said premises, or any part thereof.

There is a replication denying the material allegations of the answer.

The case was tried by the court without a jury. A motion was made by the plaintiffs for judgment on the pleadings, upon the ground that the answer substantially sets forth that at the time of the execution of the conveyance that the further indebtedness of Carl Kleinschmidt and the cattle company should become an additional claim against the interest of the plaintiffs in the premises mentioned in the deed, and that such matter in the answer was a confession that the transaction constituted a mortgage, as contended for by the plaintiffs, and not an absolute sale. This motion was denied.

The court found the facts, which may be abbreviated as follows:—

I. On May 14, 1884, the plaintiffs, being then the owners of the premises in controversy, made, executed, and delivered their warranty deed to the same to the defendants.

II. The agreed purchase price was five thousand five hundred dollars.

III. In payment of said land defendants delivered to plaintiff, Carl Kleinschmidt, their promissory note for five thousand five hundred dollars, negotiable in form, and which was subsequently negotiated by plaintiffs for full value.

IV. That on May 16, 1884, defendants made, executed, and delivered to plaintiffs their bond for a deed of said property in the penal sum of five thousand five hundred dollars; that said bond sets forth that the obligors, the defendants, are bound to the obligees, the plaintiffs, in the penal sum of five thousand five hundred dollars; that the condition of the obligation is such that if the obligors shall, on or before the first day of August, 1886, make, execute, and deliver unto the said Carl Kleinschmidt and Marie Kleinschmidt (provided the said Carl Kleinschmidt and Marie Kleinschmidt shall, on or before that day, have paid to the said obligors the sum of five thousand five hundred dollars, with interest at the rate of ten per cent per annum, the price by the said Carl Kleinschmidt and Marie Kleinschmidt agreed to be paid therefor) a good and sufficient conveyance, a guaranty deed, free from all encumbrance, all that certain lot (describing the premises), then this obligation to be void, otherwise to remain in full force and virtue, etc.

V. Said deed and bond were duly filed for record.

VI. The note given by defendants to plaintiffs was given and received in full payment of the agreed purchase price of the plaintiffs' interest in said land; that the transaction was intended as an absolute sale of the premises, and an agreement to reconvey the same upon the plaintiffs' compliance with the terms and conditions of the bond. The agreement to reconvey contained no reference to the deed, nor were there any words or provisions showing that the bond was intended as a defeasance to said deed, and the bond was not so intended.

VII. At the time of the transaction it was further agreed between the parties that plaintiffs might take up said bond by returning said note, instead of paying the amount set forth in the bond, but this was a privilege given by defendants to plaintiffs, and there was no obligation on the part of the plaintiffs to return the note unless they desired.

VIII. The delivery of the note by defendants to plaintiffs was not a loan, and did not create an indebtedness from plaintiffs to defendants.

IX. There was no act to be done by plaintiffs for which the deed was intended to be a security.

X. The intention of the plaintiffs was to make an absolute

sale, and the intention of the defendants was to make an absolute purchase, with the right of the plaintiffs to repurchase upon compliance with the terms of the bond.

XI. That the deed was not intended by any of the parties to be a security for the payment of any money or the performance of any act.

XII. The consideration of five thousand five hundred dollars was full value for the land.

XIII. That upon the execution and delivery of the deed plaintiffs gave defendants possession of the premises, which they have ever since held.

XIV. That at the time of these transactions Carl Kleinschmidt was considerably in debt, and with the exception of his interest in this land had little or no property subject to execution, and that the plaintiffs made this sale with intent to hinder and delay the creditors of Carl Kleinschmidt.

XV. On August 1, 1886, Albert Kleinschmidt, on behalf of the plaintiffs, tendered to Louis Hillebrecht, defendant, five thousand five hundred dollars, and no more, and demanded a deed under said bond.

XVI. That said Hillebrecht did not waive a tender of the full amount, which amount was five thousand five hundred dollars, with interest at ten per cent per annum from May 16, 1884.

XVII. That at no other time have plaintiffs made any other tender of money, nor have they offered to return said note.

XVIII. The note has been paid by defendants; that said payment was by them resisted in an action at law.

Upon the facts above the court found the following conclusions of law:—

1. The defendants are the owners in fee-simple, and entitled to the possession of the premises against plaintiffs, and all persons claiming under them.

2. The transactions evidenced by the deed of May 14, 1884, and the bond of May 16th, constituted an absolute sale and not a mortgage; nor was said bond intended as a defeasance of the deed.

3. No debt or other obligation was created by these transactions for which the deed could constitute a security.

4. When plaintiffs sold the land they were endeavoring to get said land out of their hands in order to delay certain creditors of the plaintiff, Carl Kleinschmidt, and by reason of their attempt to hinder and delay the creditors of Carl Kleinschmidt are not entitled to the relief of a court of equity.

5. That at no time have the plaintiffs made any legal tender of the amount due under the bond, and have therefore lost all their right to enforce from the defendants a conveyance of the land in controversy.

Upon these findings of fact and conclusions of law judgment was entered in favor of the defendants, confirming their right and title to the premises. Plaintiffs moved for a new trial on the ground: *First*. Of the insufficiency of the evidence to justify the findings and decision. The insufficiency is specified as to almost all the findings of fact, and in each instance it is to the effect simply that the finding is unsustained by the evidence, setting forth the reasons why plaintiffs consider that such evidence is insufficient. They further specify that the finding of the court, that the conveyance was made with the intent to hinder and delay the creditors of Carl Kleinschmidt, is not supported by the allegations of the answer. *Second*. Plaintiffs except to the conclusions of law by the court for the reason that said conclusions are contrary to the evidence. *Third*. Plaintiffs assign errors of law as follows: (a) Error in admitting testimony tending to show that Carl Kleinschmidt was endeavoring to hinder and delay his creditors, there being no allegation to that effect in the answer. (b) Error in overruling plaintiffs' motion for judgment on the pleadings.

The motion for a new trial was by the District Court denied. The plaintiffs appealed both from the judgment and from the order denying a new trial.

McOutcheon & McIntyre, for Appellants.

Appellants contend, and insisted in the court below, both upon a motion for judgment on the pleadings and upon objection to testimony on behalf of said respondents, that the pleadings admitted that the subject-matter of the action was a mortgage and not a sale, and that no evidence other than what was owing

from appellants to respondents was competent or admissible under the pleadings. The agreement that the indebtedness of the appellant, Carl Kleinschmidt, and the Blackfoot Horse and Cattle Company, and such additional indebtedness as they should thereafter contract, should become an additional claim against the interests of appellants in the premises described in the deed, is absolutely irreconcilable with the theory of a sale of these premises; for if the premises had been sold, what interest would appellants have in them? Again, in their answer respondents aver that the note for five thousand five hundred dollars, the consideration passing from respondents to appellants for the conveyance of May 14, 1884, was itself to be returned, and a failure to do so was to vest the absolute title to the premises in the respondents. This, too, is inconsistent with the idea of an absolute sale, for what concern could it have been of respondents what appellants did with this note, if it was the consideration, the purchase price of the land? This itself is certainly an admission on the part of respondents that said conveyance was to secure the performance of an act or obligation, which would consequently make the conveyance a mortgage. (*Gassert v. Bogk*, 7 Mont. 597.) The deed and bond in this case were, as the evidence shows, delivered at the same time; the parties in both instruments are the same; the consideration expressed in both is the same; the note given by respondents is to Carl Kleinschmidt alone, although the appellants owned the land jointly. These make the transaction necessarily a mortgage. (*Taylor v. Weld*, 5 Mass. 109; *Newhall v. Burt*, 7 Pick. 156; *Nugent v. Riley*, 1 Met. 117; *Colwell v. Woods*, 3 Watts, 188; *Kerr v. Gilmore*, 6 Watts, 405; *Brown v. Nickle*, 6 Pa. St. 390; *Wilson v. Shoenburger*, 31 Pa. St. 295; 1 Jones on Mortgages, § 248; *Gillis v. Martin*, 2 Dev. Eq. 470; 25 Am. Dec. 729.) The law is well settled that when an instrument purporting to be a deed is made, and at the same time a bond to reconvey the land described in it is given, especially as in the case at bar, when the sum mentioned in the bond is the precise consideration for the deed, that much less evidence is required to stamp the transaction as a mortgage; and that thereupon all that is necessary for the person alleging the instrument to be a deed to do is to introduce testimony tending to raise a doubt in the mind of

the judge as to the character of the instrument; when this is done that the law says, the instrument must be declared a mortgage and not an absolute sale. (*Gassert v. Bogk*, 7 Mont. 600.) A summary of the testimony shows: An application about May 14, 1884, by Carl Kleinschmidt, one of the appellants, to respondents for certain accommodation. The giving by respondents of the note for five thousand five hundred dollars, payable on or before August 1, 1886, with interest from its date at the rate of ten per cent per annum. The understanding that this note was an accommodation note merely. The action of respondent, Reinhold H. Kleinschmidt, in going to different banks in Helena, and notifying them that this particular note was accommodation paper and for them not to discount it. The positive verified allegations on the part of these respondents in the suit of the *Second Nat. Bank v. Kleinschmidt*, that this precise note referred to was made by them for the accommodation of Carl Kleinschmidt only, and that they had received no consideration for the same. The resisting payment of said note, and their demand that execution should issue therein against the other defendants. The application by respondent Hillebrecht to Carl Kleinschmidt to protect this paper, and thus avoid the said suit. The various offers on the part of the respondents to re-deed this land long after the time when the bond expired, on the payment of said note, and of other alleged indebtedness claimed to be due to them from Carl Kleinschmidt, and to be a lien on this land. The taking Carl Kleinschmidt's agreement that he would give a mortgage on this land to secure a note of one thousand one hundred dollars, and the agreement that this note should be paid from the proceeds of said land. The written memorandum in the handwriting of Reinhold H. Kleinschmidt, in pencil, on the account furnished Carl Kleinschmidt by Louis Hillebrecht, subsequent to December 1, 1886, to the effect that after Carl paid his debts he should receive a deed for this land. The positive admission on the part of Reinhold H. Kleinschmidt on cross-examination that this land was held by respondents as security for the payment by Carl Kleinschmidt of this note and of such other debts, and this after the many twistings of witness on his examination and cross-examination. The levy by respondents of certain attach-

ments against the interest of Carl Kleinschmidt in this precise land, as late as November 19, 1889, more than three years, according to their contention, after such interest had absolutely passed from him and become vested in them. Now appellants contend that none of these things could have reasonably been had had the transaction of May 14, 1884, been intended as an absolute sale, or even a sale condition to be absolute on August 1, 1886; and that they are conclusive of appellants' contention that the transaction at bar was a mortgage or security. At least, they raise the doubt whether said instrument was absolute or intended as security, and, as courts of equity incline to construe such a transaction to be a mortgage, are sufficient to entitle appellants to the relief prayed for herein. For these reasons appellants insist that the findings of the court are absolutely and irreconcilably in conflict with the testimony; and that for that reason their motion for a new trial herein should have been granted. The bond executed and delivered by respondents to appellants was in effect a defeasance. It therefore became incumbent upon respondents to prove that the transaction was intended as a conditional sale and not a mortgage. (*Edrington v. Harper*, 3 Marsh. J. J. 353; 20 Am. Dec. 145; *Turnipseed v. Cunningham*, 16 Ala. 501; 50 Am. Dec. 190.)

Cullen, Sanders, & Shelton, and A. C. Botkin, for Respondents.

The motion for judgment on the pleadings by the appellants was properly overruled by the court, because all the material allegations of the complaint are denied in the answer, and most of the affirmative allegations of the answer are denied by the replication, the point at issue being whether the transaction is a mortgage or a conditional sale. The complaint alleges that it was a mortgage; the answer denies it, and under the decision of the court in *Gassert v. Bogk*, 7 Mont. 585, parol evidence is admissible to show the real character of the transaction. "If the answer contains a denial of any material fact, judgment on the pleadings cannot be granted." (*Nudd v. Thompson*, 34 Cal. 39; *Amador County v. Butterfield*, 51 Cal. 526; *Botto v. Vandament*, 67 Cal. 332.) The agreement set forth in the answer with reference to the indebtedness of Carl Kleinschmidt and

the Blackfoot Horse and Cattle Company was to be ineffectual unless said plaintiffs complied with the terms and conditions of said bond, and delivered up the note as set forth in said answer, and that in case of the failure on their part in any or all these respects said plaintiff ceased to have any interest in or to said premises, or any part thereof, or in or to the proceeds of the sale of the same. It is conceded by the appellants that parol evidence was admissible to determine the exact contract between the parties. (*Gassert v. Bogk*, 7 Mont. 597; *Chase's Case*, 1 Bland, 206; 17 Am. Dec. 277.) And the authorities cited in appellants' brief upon this question are taken *seriatim* from the note to the latter case on page 304, 17 Am. Dec., and the reporter says in commenting on it: "But the better doctrine certainly is, that a contemporaneous deed and bond to reconvey on payment of a sum of money do not even in equity necessarily constitute a mortgage; but that the construction of the contract depends upon the question whether or not security for a debt was intended." The court having found as a fact from all the testimony that a mortgage was not intended, but that the transaction was an absolute sale with a bond back, and the finding of the court being supported by a preponderance of evidence, the question as to whether the transaction was a mortgage or conditional sale cannot now be raised in this court, upon the familiar principle that if there is any evidence to sustain the findings of the court the judgment will not be reversed. Carl Kleinschmidt took back a bond for a deed to this property; but the bond nowhere refers to the deed, nor does it appear from the papers that there was any connection whatever between the giving of the deed by Carl Kleinschmidt to the defendants, and the giving of the bond by the defendants to Carl Kleinschmidt. So that the transaction, taken together, and giving the most favorable construction possible to Carl Kleinschmidt, is at the most a conditional sale. No debt appears to be due or owing from plaintiff to defendants. (*Jones on Mortgages*, § 265.) "Where there is no debt and no loan it is impossible to say that an agreement to sell will change an absolute deed into a mortgage." (*Glover v. Payn*, 19 Wend. 518.) There was no debt incurred by the plaintiff to defendants at the time of the original transaction; and this appears to be almost

conclusively established by the fact that the defendants, neither in the form of a note nor of any other writing, took any obligation to show any indebtedness from plaintiff to defendants. (*Horn v. Keteltas*, 46 N. Y. 605; *Jones on Mortgages*, § 272; *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. 467; *Devlin on Deeds*, § 1129.) The fact that plaintiff delivered possession of the premises to the defendants is a strong circumstance to show that the transaction was an absolute sale and not a mortgage. The consideration which was paid for the land by the defendants appears to have been the full value thereof at the time of the original transaction. (*Jones on Mortgages*, § 275.) "The fact that the consideration is fully equal to the value of the land is evidence of some weight that the transaction was a sale and not a mortgage; because in making a loan, men don't usually advance the full amount of the land." (*Carr v. Rising*, 62 Ill. 14. See *Devlin on Deeds*, § 1133; *Coyle v. Davis*, 116 U. S. 108.) The character of the transaction is fixed in the beginning. (*Devlin on Deeds*, § 1134.) When an attempt is made to convert a deed absolute in form into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage; otherwise, the intention appearing on the face of the deed will prevail. (*Henley v. Hotaling*, 41 Cal. 22; *Manasse v. Dinkelspiel*, 68 Cal. 404. See, also, *People v. Irwin*, 14 Cal. 428; *Flagg v. Mann*, 14 Pick. 467; *Page v. Vilhac*, 42 Cal. 75; *Rich v. Doane*, 35 Vt. 125; *Morris v. Angle*, 42 Cal. 236; *Wallace v. Johnstone*, 129 U. S. 58; *Cadman v. Peter*, 118 U. S. 73; *Howland v. Blake*, 97 U. S. 624; *Horbach v. Hill*, 112 U. S. 144; *Coyle v. Davis*, 116 U. S. 108; *Robinson v. Cropsey*, 6 Paige, 480; *Calhoun v. Lumpkin*, 60 Tex. 185; *De Bruhl v. Maas*, 54 Tex. 464.) If this transaction was a sale with a right to purchase back, then if the plaintiff failed to comply with the terms of the bond and pay the money fixed therein as the purchase price of the premises, he lost all his rights to compel, and cannot now compel a conveyance to him of the premises. (3 *Pomeroy's Equity Jurisprudence*, § 1194, n. 1; *Hughes v. Sheaff*, 19 Iowa, 335; *Saxton v. Hitchcock*, 47 Barb. 220; *Whitney v. Townsend*, 2 Lans. 249; *Page v. Vilhac*, 42 Cal. 75; *Morris v. Angle*, 42 Cal. 236.) The bond to reconvey was

not a defeasance in any acceptation of the term. (3 Comyn's Digest, title "Defeasance," p. 354.) The covenant or agreement to reconvey is not a defeasance necessarily, either at law or in equity. (Jones on Mortgages, § 260; *Calhoun v. Lumpkin*, *supra*; *Horbach v. Hill*, *supra*; *Henley v. Hotaling*, 41 Cal. 22.)

DE WITT, J.—We are of opinion that the plaintiffs' motion for a judgment on the pleadings was properly denied. The allegations of the complaint material to the plaintiffs' theory of the case are all specifically denied in the answer. The further matter set up in the answer, as to the indebtedness of Carl Kleinschmidt and the Blackfoot Horse and Cattle Company, existing and to be incurred, to defendants, being a lien on plaintiffs' interest in the land, was conditioned upon plaintiffs complying with the terms of the bond. It left the inquiry to be decided by the evidence, whether the intent of the parties was that the transaction should be a mortgage or a sale; and the court properly heard evidence upon that issue. The prayer of the complaint seems to be for specific performance on the bond. Plaintiffs pray that the defendants reconvey the premises. Such relief could not be granted on the bond.

An inspection of that instrument reveals the fact, that the obligors make no covenant to reconvey. They simply agree that, if the obligees pay them five thousand five hundred dollars and interest, and if they, the obligors, do *not* make, execute, and deliver a deed, then the bond of five thousand five hundred dollars shall be in full force, otherwise to be null. The obligors could discharge the bond by accepting the tender of five thousand five hundred dollars and interest, and then paying the penal sum of five thousand five hundred dollars to the obligees. No conveyance could be compelled under the bond if a valid tender had been made. But appellants, in their brief before us, demand "other and further relief," as prayed in the third division of the prayer of the complaint; that is, that the deed in evidence be declared to be a mortgage, and that they have leave to redeem such mortgage.

We have carefully examined the voluminous evidence in the record. It demonstrates beyond question that, although there

was a conflict and contradiction, the findings of the court are sustained by the evidence and a preponderance thereof. Such was the view of the lower court on the trial, and on the motion for a new trial. This court will not now disturb those findings. We will say in passing that the view we take of the other points of the case makes it unnecessary to decide whether the fourteenth finding is supported by the pleadings. That finding is not necessary to the determination of the case.

The only other question before us is the conclusion of the court, from the facts that the transactions were a sale and not a mortgage.

This whole proposition has recently been so ably discussed, and the law so clearly defined by the late territorial Supreme Court through Mr. Justice Bach (*Gassert v. Bogk*, 7 Mont. 585), that the law is no longer, with us, an open question. The court in that case says: "The cases cited may be divided into three classes: (1) Those cases in which the papers (deed and bond) upon their face recite that the transaction is one for the security of a loan. (2) Those cases where evidence *aliunde* shows that a mortgage and not a sale was intended, including cases where the evidence shows such facts as a previous loan, an application for a loan, great difference in value, application on the part of grantee to have the debt or portion thereof repaid. (3) Cases in which the courts hold that a deed with contract to reconvey are *per se* mortgages."

The case at bar is not included within the first class. The court in *Gassert v. Bogk* disavow the doctrine in the third class. The only standing for appellants is to bring themselves within the second class.

Changing the names of parties to those in this case, we may read again from *Gassert v. Bogk*, page 599: "In the case under consideration, the deeds and contract upon their face show an absolute conveyance. No obligation appears therefrom binding Carl Kleinschmidt to pay anything; no words appear from which the characteristic of security, so essential to a mortgage, can be deduced. *Prima facie*, the transaction is one of sale. It is incumbent upon the plaintiffs to produce some evidence tending to show that a mortgage in fact was intended." And at page 600, same case, as follows: "Where the papers do not show that

a security was meant, it is incumbent upon the party seeking to establish a mortgage to show that a mortgage was intended."

The court in the case before us has found from the evidence that a mortgage was not intended, but that the papers were intended as an absolute sale, and an independent privilege to repurchase. The reason and the authority of *Gassert v. Bogk* are sufficient in this case.

We are of opinion that the judgment and order denying the motion for a new trial should be affirmed, and it is so ordered.

BLAKE, C. J., and HARWOOD, J., concur.

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STATE, APPELLANT, v. SULLIVAN, RESPONDENT.

CRIMINAL LAW — Imprisonment for costs. — Where the statute does not make the costs part of the punishment for the crime of which a defendant is convicted, he cannot be imprisoned for the non-payment of costs in cases originally prosecuted in the District Court, but a judgment for such costs may be enforced as in civil actions.

SAME — Former acquittal — Variance in names — Idem sonans. — The defendant in the case at bar pleaded a former acquittal of the same offense on the ground of a variance between the proof and the indictment, in that the person injured was described in the indictment as John Moya, and the proof showed his true name to be John Maze. *Held*, that as the surnames were not alike in sound or in spelling, and the offense was not described with sufficient certainty in other respects to identify the act, the variance was material, and the former acquittal was therefore not a defense to the second prosecution.

Appeal from Second Judicial District, Deer Lodge County.

The defendant was tried before DUFFEE, J.

Henri J. Haskell, Attorney-General, for the State, Appellant.

The judge of the District Court has authority to dismiss the case and order a *nol. pros.* of the indictment, and to direct a resubmission or re-examination of the charge, and in the mean time detain the defendant in custody for his appearance to answer a new indictment, where: (1) If the defendant is formally acquitted on the ground of a variance between the indictment and the proof; or (2) upon an objection to the form or substance of the indictment, it shall not be deemed an acquittal of the

same offense. (*Commonw. v. Farrell*, 105 Mass. 189; *People v. Schmidt*, 64 Cal. 263; *People v. McNealy*, 17 Cal. 333; *People v. Hughes*, 41 Cal. 235; *Swindel v. State*, 32 Tex. 102; *Morgan v. State*, 34 Tex. 677.) Upon the evidence the defendant was rightly acquitted under the first indictment, because it did not support the averment. The averment was that this defendant attempted to kill and murder one John Moys, while the evidence showed that the person assaulted was one John Maze. Does that verdict protect the defendant under the second indictment? The true criterion by which the question is to be decided is, whether the evidence necessary to support the second indictment would have been sufficient to convict the defendant on the first. (*State v. Birmingham*, Busb. 122.) In such cases a former acquittal is no bar to a conviction upon a second indictment. (*State v. Revels*, Busb. 200; *Pennsylvania v. Huffman*, Addis. 140; *Martha v. State*, 26 Ala. 75; *State v. McCoy*, 14 N. H. 364; *People v. Warren*, 1 Parker, Cr. C. 339; *People v. Burns*, 1 Parker, Cr. C. 184; *Commonw. v. Wade*, 17 Pick. 390; *Commonw. v. Smith*, 2 Va. Cas. 273, 325; *Price v. State*, 19 Ohio, 424.) New trial for the same offense for error does not place the defendant twice in jeopardy. (*People v. Gilmore*, 4 Cal. 376; *People v. March*, 6 Cal. 543; *People v. Howell*, 28 Cal. 456; *People v. Baza*, 53 Cal. 690; *People v. Hardisson*, 61 Cal. 379; *People v. Schmidt*, 64 Cal. 260.) The trial which had already been had was a mistrial, and did not relieve the party from further liability. (*State v. Sutton*, 4 Gill, 494; *People v. Cochran*, 6 Md. 407.)

The point contended for by the State attorney in this case is, that the court erred in not ordering the prisoner's committal on a judgment under section 368, page 471 of the Compiled Statutes. In a case like this the defendant was not entitled to a discharge on the payment of the whole of the fine (without costs), because the judgment was that he pay the costs as well as the fine. They being inseparable must be paid, and in case of a failure to pay either, or any part of either, imprisonment follows. (§ 369, *supra*; § 370, p. 471, Comp. Stats.; *Ex parte Harrison*, 63 Cal. 301.) The same rule applies to justices of the peace as applies to judges of the District Court, so far as requiring them to commit the defendant to the county jail for

the fine and costs in case of conviction. (§ 508, p. 496, Comp. Stats.) When the law says that the defendant shall be fined and also pay the costs, and that he be committed until they are paid, the costs are included with the fine as a part of the judgment. A failure to order a committal is a failure of justice. In *Albertson v. Kriechbaum*, 65 Iowa, 17, Reed, J., says: "The power to tax the costs of the prosecution against the defendant exists independently of the statute in question." (See, also, *State v. Darr*, 63 N. C. 517.)

John F. Forbis, for Respondent.

Both parties appeal from the decision in this case. Sullivan had been previously indicted for the same offense as charged in the indictment in the present case, but in the former case the indictment charged that the assault was committed upon one John Moys. This appearing to the court, the jury were instructed to acquit Sullivan, and the jury returned a verdict of not guilty. Subsequently another grand jury indicted Sullivan for an assault upon John Maze. Sullivan pleaded former acquittal, and introduced in evidence the records of his former trial and acquittal, which the court refused to admit in evidence. This was error. The fact of the misnomer in the former indictment was immaterial. (§ 189, p. 438, Comp. Stats.) If the error was immaterial, then the former acquittal was conclusive, and Sullivan cannot be indicted again for the same offense. (*People v. Hughes*, 41 Cal. 234.) Upon the State's appeal we insist that the court had no authority in law to imprison one for the non-payment of costs. There is no provision of statute providing for such imprisonment unless the statute expressly declares that the imprisonment shall extend to costs as well as the fine. The statute declares that every person convicted of assault shall be fined in a sum not less than five, nor more than fifty dollars. (§ 57, p. 511, Comp. Stats.) The statute does not provide that in such cases the costs shall be added to the fine and the defendant imprisoned until the same is paid. The law provides expressly that there shall be a civil judgment entered against the defendant for costs. (§ 410, p. 479, Comp. Stats.) This section also provides how the costs shall be col-

lected in criminal cases. Before a defendant can be imprisoned upon a judgment for costs, the law must provide in express terms that upon conviction he shall be fined an amount including costs. (*Petty v. County Court of San Joaquin County*, 45 Cal. 245.)

HARWOOD, J.—Both parties to this action appeal. The defendant was indicted for an assault upon one John Maze, with intent to commit murder. Upon the trial the jury returned the following verdict: "We, the jury, find against the defendant on his plea of former acquittal, and that he is guilty of a simple assault, and fix his punishment at a fine of fifty dollars," whereupon the court pronounced judgment against the defendant that he "pay the fine of fifty dollars assessed by the jury in the said above cause, and further that he pay the costs of this prosecution."

The record shows that the defendant paid said fine of fifty dollars when the judgment was pronounced, but did not pay the costs of prosecution. The State, by its attorney, then moved the court for an order that defendant be committed to the county jail until said costs were paid. On the hearing of this motion, after argument of counsel for both parties, the court overruled said motion, on the ground, as stated by the court, "that it appears that there is no law to imprison a defendant for the non-payment of costs in such a case; and the defendant was thereupon ordered discharged." To that ruling the State excepted, and by bill of exceptions reserved the question of law involved in said ruling, and the same is assigned by the State in its appeal herein as error.

We will consider this branch of the appeal first.

The section of our statute defining the crime of assault, and providing the punishment therefor (Comp. Stats. Crim. Laws, § 58), is as follows: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another; and every person convicted thereof shall be fined in a sum not less than five nor more than fifty dollars."

The defendant's counsel insists that, inasmuch as the law defining the crime of assault, and providing the punishment therefor, does not include the costs as part of the fine or punish-

ment, the defendant cannot be lawfully imprisoned for non-payment of costs, but that such costs may be enforced as in a civil judgment, as provided by section 410, Criminal Practice Act.

After a careful review and analysis of the various provisions of the statute defining crimes and punishments, and the manner of entering and enforcing judgments for costs in criminal actions, we conclude that the point on the part of the defendant is well taken, and that the order of the court should be sustained in this particular case. We question, however, that it should be so, even in this case, and under the same statute, if the defendant had been convicted of a simple assault in a Justice's Court, or had been convicted in the District Court on appeal from the Justice's Court. It will be observed that the statute governing the practice in criminal cases in the Justice's Court, and in cases appealed from that court to the District Court, provides as follows (§ 508, Crim. Prac. Act): "In all cases of conviction under the provisions of this chapter, the court shall enter his judgment for the fine and costs against the defendant, and may commit him until the judgment is satisfied, as in cases in the District Court." (See, also, §§ 514, 515, 517, Crim. Prac. Act.) These general provisions as to costs are confined to "cases of conviction under the provisions of this chapter," which applies to cases commenced in the Justice's Court. We do not find any such general provision applying to all cases of conviction in the District Court, requiring the costs to be made part of the penalty. It follows that in cases originally commenced in the District Courts, where the statute does not make the costs part of the punishment for the crime of which the party is convicted, there is no provision of statute authorizing imprisonment for non-payment of costs. There is provision, however, for enforcing the judgment for costs as in civil actions. (§ 410, Crim. Prac. Act.)

The statute frequently in defining crimes and punishments provides that persons convicted thereof shall be fined or imprisoned, or both, "with costs of prosecution," or "together with costs of prosecution," as in the cases provided for in sections 65, 147, 148, 179, 262, 265, and others of Criminal Laws Practice Act. In such cases, the costs are made part of the fine or punishment, to be enforced in the same manner as the

fine under the provisions of section 368, Criminal Practice Act. In the case at bar, the crime of which defendant was convicted is not declared by statute punishable by fine and costs, or with costs; hence there is no law authorizing imprisonment in that case for non-payment of costs alone.

We will now proceed to consider and determine the matter assigned as error by the defendant as appellant.

It appears from the defendant's bill of exceptions that the indictment upon which defendant was convicted, as above stated, charged him with the crime of assault upon one "John Maze," with intent to commit murder. On his arraignment, the defendant entered a plea of "not guilty," and of "former acquittal of the offense charged." Upon the trial defendant offered in evidence a former indictment charging him with an assault upon one "John Moys," with intent to commit murder, and with this former indictment defendant offered in evidence the journal of the court showing the trial thereon, and that on such trial defendant, by his counsel, moved the court "to dismiss the action on account of variance between the proof and the charge in the indictment; which, being fully heard and considered by the court, was sustained, whereupon the court instructed the jury to find the defendant not guilty;" that the jury returned its verdict accordingly, and the court further ordered that the defendant be held and admitted to bail in the sum of one thousand dollars, to await the action of the next grand jury. The record further shows that in connection with the evidence so offered by defendant "it was agreed between the counsel for the State and for the defendant that the offense charged in the indictment under which the defendant is now on trial and the former indictment are one and the same offense; that the defendant was acquitted on the former trial for the reason that there was a variance between the proof and the indictment, in this, that in the indictment the party injured was described as 'John Moys,' and the proof shows that the party injured was 'John Maze,' and that on account of such variance the court instructed the jury to acquit the defendant," which evidence and said admissions were offered "for the purpose of showing former acquittal, as set up in the defendant's plea."

Objection was made by the attorney for the State to the

admission of such proffered evidence, "for the reason that the same was irrelevant, immaterial, and did not show a former acquittal, and for the reason that defendant had been formerly acquitted upon a material variance between the indictment and the proof, and that the facts set forth in the proffered proof do not constitute an acquittal." The court sustained this objection, and refused to allow such proffered evidence to be submitted to the jury; to which ruling defendant, by counsel, excepted, and on this appeal assigns such ruling as error.

Counsel for defendant now insists that the misnomer in describing the person assaulted, as alleged in the first indictment, was an immaterial variance, and that if such variance was immaterial, the acquittal on the former indictment is a bar to conviction on the indictment in this action for assault on John Maze.

The statute provides (§ 223, Crim. Prac. Act): "If the defendant is formally acquitted on the ground of a variance between the indictment and the proof, or upon an objection to the form or substance of the indictment, it shall not be deemed an acquittal of the same offense."

It has been held in a great number of cases that where the evidence shows a substantial mistake or misnomer (not merely a slight variation in spelling, where the same sound is preserved) in describing, or attempting to describe in the indictment the party injured, or whose property is injured or stolen, is fatal to the prosecution, and sufficient cause to discharge the prisoner on that prosecution.

Modern decisions seem to be quite unanimous on this general proposition. (*Laynes v. State*, 5 Port. 236; *Donnel v. United States*, 1 Morris, 141; *Parchman v. State*, 2 Tex. App. 228; *Morgan v. State*, 34 Tex. 677; *People v. Allen*, 61 Cal. 140; *People v. Hughes*, 41 Cal. 234; *People v. McNealy*, 17 Cal. 333.)

Taking the general proposition above laid down, together with the doctrine of *idem sonans*, we have a reasonable guide by which to determine the question in the case under consideration. Moreover, we have many particular examples to which the courts have applied these general doctrines. "Modern decisions make no distinction between a misnomer of the surname and the Christian name," says Justice Collier in *Laynes v. State*, *supra*.

In the case at bar the trial court held that the difference between the two names involved a material variation, not only in the spelling of the surnames, Moys and Maze, but that these names are not alike in sound, and the variance was material. This ruling is abundantly supported by authorities, and we find no error in it. In this connection counsel for defendant cites section 189, Criminal Practice Act, which provides as follows: "When an offense involves the commission, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be deemed material."

An examination of the indictment in the case at bar reveals the fact that the offense is not described with sufficient certainty to identify the act, if the name of the party assaulted be disregarded or deemed immaterial.

Judgment affirmed.

BLAKE, C. J., and DE WITT, J., concur.

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9	588
9	591
9	604

9	497
18	198
18	366

HEYFRON, RESPONDENT, v. MAHONEY, APPELLANT.

ELECTIONS — *Name of candidate misspelled.* — Under section 1044, fifth division of the Compiled Statutes, providing that technicalities, or error in spelling the name of any candidate for office, shall be disregarded on the trial, it was properly ordered, in the trial of an election case, that certain votes, with the name "Dan Heyfron," should be counted for Daniel J. Heyfron, he being a candidate for the office for which such votes were cast, and being the only person having this surname within the county.

SAME — *Failure of judges to take oath.* — Where there is a fair vote and an honest count, it is no ground for the rejection of the returns of a voting precinct that the judges of election were not sworn. (Case of *Wells v. Taylor*, 5 Mont. 208, affirmed.)

SAME — *Place of voting.* — Where the election in a certain voting precinct was held at a place more than three miles distant from the place designated by the commissioners of the county, the election is void, and the vote returned from such precinct is properly excluded from the total of votes cast in the county.

SAME — *Apportionment of illegal votes.* — Where it appeared that a certain number of votes cast at a particular precinct were illegal, a finding by the court, apportioning said illegal votes and deducting them from the whole vote received by each party to the contest, in the proportion that the vote of each party bore to the whole vote cast at said precinct, was proper where there was evidence to support the finding, although the entire vote of such precinct might have been properly excluded as tainted with fraud.

SAME — Amendments during trial of contest.—The provisions of the Code of Civil Procedure, relating to amendments to pleadings, apply to election contests, and the permitting of an amendment to a statement of contest in correcting the spelling of the names of persons, and the addition of other names to conform to the proof, is not an abuse of judicial discretion when it does not appear that the adverse party was misled thereby.

SAME — Evidence — Subpoena.—Upon the trial of an election contest the contestant offered in evidence a subpoena, together with the return of the coroner, showing that he was unable to find the persons named therein, comprising the alleged illegal voters. *Held*, that the subpoena and return tended to prove a proper effort on the part of the contestant to bring before the court the best evidence, and was properly admitted.

Appeal from Second Judicial District, Missoula County.

The cause was tried before DE WOLFE, J.

Woody & Webster, for Appellant.

The subpoena, with the coroner's return thereon, was inadmissible and incompetent as evidence; and its admission by the court over the objection of appellant was error. During the trial the respondent, by leave of the court, filed an amendment to the eleventh ground of contest, and the appellant then moved the court to strike out a portion of said amendment, which motion was overruled by the court; and this we hold was error. The evidence does not support the findings of the court in this. It does not show that 66 illegal votes, or any illegal votes, were cast at Bonner precinct. The evidence does not show that the persons whose names are contained in the list of names furnished by the witness Chandler were the same persons whose names are contained in the poll-book of that precinct. The evidence also wholly failed to show that any illegal vote was cast at Bonner for the appellant for the office of sheriff. This was the issue made by the pleadings, and the appellant contends that under the pleadings and the law the respondent was bound to show, not only that illegal votes were cast, but that they were cast for appellant; and that "if it cannot be shown for whom the illegal votes were cast, then the complaint must fail for want of proof, the same as any other case which is lost for want of sufficient evidence to sustain it." (*McDaniel's Case*, *Brightly's Leading Cases on Election*, pp. 248, 249; *Tarbox v. Sughrue*, 36 Kan. 225; *Ex parte Murphy*, 7 Cowan, 153; *People v. Cicoll*, 16 Mich. 283; *Sudbury v. Stearns*, 21 Pick. 148; *Trustees v. Gibbs*,

2 Cush. 39; *Deloatch v. Rogers*, 86 N. C. 360; *Judkins v. Hill*, 50 N. H. 140; *State v. Lehre*, 7 Rich. 234; *McNeely v. Woodruff*, 1 Green, 352; *People v. Tuthill*, 31 N. Y. 550; *Prince v. Skillin*, 71 Me. 361.)

Word & Smith, for Respondent.

By reference to the affidavit of contest and the answer of appellant, it will be seen that the appellant, by refusing to deny the allegation, virtually and legally admits that the 6 votes cast for *Dan Heyfron* at Noxon precinct should have been counted for the respondent, and upon these allegations the respondent was entitled to a judgment, to have said 6 votes counted for him for the office of sheriff of said county. The election at O'Keefe precinct was held at a place three and one-half miles distant from the house designated by the board of county commissioners. This action of the court in excluding said precinct from the vote for sheriff was legal and proper, and is sustained by the law in most adjudicated cases. (See *McCrary on Elections*, §§ 123, 124; *Knowles v. Yates*, 31 Cal. 93, 94.) Where the record does not disclose the evidence upon which a finding of the court is based, it is presumed that the judgment of the court was sustained by the proof. (See *Wilson v. Davis*, 1 Mont. 189, 190; *Morse v. Swan*, 2 Mont. 307; *Chumasero v. Vial*, 3 Mont. 378, 379; *Story v. Black*, 5 Mon. 41.) Many other cases could be cited to the same effect, and where the evidence in a case upon which a court bases its findings is conflicting the cause will not be reversed. (See *Reynolds v. Snow*, 67 Cal. 497.) And first, did the court err in allowing the respondent to introduce in evidence a subpoena issued to the coroner of Missoula County, for all the persons charged by the respondent as illegal voters at Bonner precinct, with the coroner's return that the parties (except one or two) could not be found in Missoula County? It will be remembered that the election took place November 6, 1888, and the subpoena was issued December 22d, and returned December 26, 1888, by the coroner. Now if these parties were residents and voters on November 6, 1888, it is hardly probable that all had removed from the county before December 22d, less than sixty days after the election. To show

that the persons charged as illegal voters were not residents of the county, the respondent had the subpoena issued and placed in the hands of the proper officer for service, and the introduction of this subpoena and the coroner's return was proper, and was the best way of proving that the persons were not in the county. Unless the appellant can show that his interests were prejudiced by this innocent subpoena, the cause will not be reversed. (*Gillett v. Clark*, 6 Mont. 193; *Norwood v. Kenfield*, 30 Cal. 394.) Under a statute like ours, where it is absolutely impossible to show how the illegal vote was cast, what course will the courts pursue in determining a contest for office, when it has been shown that *illegal votes, sufficient to change the result*, have actually been polled and counted? All the authorities agree that the polls should be purged of the illegal votes, unless the court or board canvassing have the *power to order a new election*. The courts here on the trial of a contest have no power to order a new election and declare the office vacant; hence the judge trying the cause must, under the law, resort to one of two different ways to purge the poll: *First*, deduct all the illegal votes from the candidate receiving the highest vote at the particular poll or precinct; or *second*, deduct the *illegal votes* from the whole vote of that particular precinct, in the proportion that each candidate's vote bears to the whole vote; in other words, *divide the illegal votes between the candidates in the same proportion* that the total vote cast for each candidate bears to the whole vote of said precinct. This was the course adopted by the trial court in the case at bar, and it is sustained by almost all the authorities and law writers. (*McCrary on Elections*, §§ 460, 461, 462; *People v. Cicott*, 16 Mich. 311.)

BLAKE, C. J.—At the general election, held November 6, 1888, Daniel J. Heyfron was the Democratic, and Cain B. Mahoney was the Republican candidate for the office of sheriff of the county of Missoula. The official canvass of the returns from all the precincts showed that Mahoney had received 1,843 votes and Heyfron 1,797 votes, and the certificate of election was delivered to the first-named person. Heyfron then initiated this contest by filing with the county clerk his statement, which sets forth many grounds under the provisions of the statute.

(Comp. Stats. div. 5, §§ 1043, 1044.) Mahoney interposed a demurrer, which was overruled, and thereupon answered, and Heyfron filed his replication. The cause was tried by the court without a jury, and the evidence, which was offered by the contestant, related solely to the precinct at Bonner, where Mahoney had 171 votes and Heyfron had 51 votes. No testimony was introduced by Mahoney, and the court made its findings of the facts from the pleadings and the evidence, and adjudged that Heyfron was entitled to the office. The motion of Mahoney for a new trial was overruled, and an appeal was taken to the Supreme Court of the Territory of Montana. The transcript does not contain any request for a finding in writing by the parties, and we will examine the errors which have been assigned.

It is admitted by the pleadings that six ballots were cast at the precinct of Noxon with the name of "Dan Heyfron" for the office of sheriff upon them; that the contestant was the only person having this surname within the county of Missoula; and that the board of canvassers did not count the same for the respondent. The statute requires that "the District Court shall hear and determine in such manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes for such office, not regarding technicalities or error in spelling the name of any candidate for such office." (Comp. Stats. div. 5, § 1044.) It was therefore properly ordered that these votes should be counted for Daniel J. Heyfron for said office.

The court further finds "that the whole vote returned by the canvassers from O'Keefe precinct, being 28 votes for contestee, Cain B. Mahoney, and 12 votes for contestant, Daniel J. Heyfron, be excluded or thrown out and disregarded in making up the sum total of votes cast in the county for said office of sheriff." The statement of the contestant upon this ground is as follows: "Because, at the voting precinct known as 'O'Keefe,' the election was not held at the place designated by the county commissioners for holding the election, and because the judges who held such election were not sworn. The place designated by the county commissioners was the house of one Blanchard, and the election was held at Evaro, more than three miles distant from the place designated by the commissioners." The answer

does not deny these averments, but alleges the reasons for the opening of the polls at Evaro; that one of the judges who had been appointed, and had in his possession the poll-books and ballot-box, notified the persons at Blanchard's house of this change; that every citizen who lived in the vicinity voted; and that no one was prevented by this removal from voting; and that the election held at this precinct was conducted honestly, and according to law. The replication controverts these reasons, which are matters regarding the convenience of voters, the size of Blanchard's house, and the quantity of whisky therein on the day of the said election, and "denies that all the voters of said precinct of O'Keefe had an opportunity to vote at said election." No evidence upon this point appears in the record, and we must be governed by the pleadings, which confess the facts specified in this ground. "Previous to votes being taken, the judges . . . shall take and subscribe the . . . oath." (Comp. Stats. div. 5, § 1015.) The statutes provide for the holding of elections "in the several counties, townships, or precincts in this Territory"; that the board of commissioners of the counties shall set off and establish "townships or precincts, when the same may be necessary"; that the clerk of the board "shall, at least thirty days before any general election, make out . . . three written notices for each township or precinct, said notices to be, as near as circumstances will admit, as follows: Notice is hereby given that . . . at the house of ———, in the county of ———, an election will be held; . . ." that these notices shall be posted in the township or precinct, "one at the house where the election is authorized to be held; . . ." and that the form of entry in the poll-books, "as near as circumstances will admit," shall be as follows: "At an election held at the house of A B, in the township or precinct of ———." (Comp. Stats. div. 5, §§ 1009, 1011, 1013, 1014, 1030.)

We cannot ascertain from the transcript the views of the court below upon the objections of the contestant to the returns of the O'Keefe precinct. That which is founded upon the failure of the judges to be sworn cannot be sustained. In *Wells v. Taylor*, 5 Mont. 208, Mr. Chief Justice Wade, as the organ of the court, said: "The question is, was there a fair vote and an honest count? If there was, the election is valid, though the

officers conducting the same were not duly sworn or chosen, or did not possess the qualifications requisite for the office." (And see the cases there cited.)

What, then, was the legal effect of the removal of the polling place more than three miles from the house of Blanchard to Evaro? Mr. McCrary, in his work on Elections, writes: "It must be conceded by all that time and place are of the substance of every election, while many provisions which appertain to the manner of conducting an election may be directory only." (§ 141. 3d ed.) The same opinion is expressed by Mr. Paine in his treatise on Elections. "The requirement that the election shall be held at the place designated by law is not directory; it is mandatory, and must be obeyed." (§ 327.) In *Knowles v. Yates*, 31 Cal. 92, the court says: "Sullivan's house, which was three miles from the warehouse, was the place designated by the board of supervisors, and the fact that a copy of the proclamation was posted upon the warehouse is not sufficient to overcome the direct and positive evidence that Sullivan's house was the place designated. The conduct of the persons acting as officers of the election, in opening the polls and holding the election at a distance of three miles from the place appointed by the proper authority, was without any just excuse and unauthorized, and in that respect was, in the sense of the statute, malconduct." In *Melvin's Case*, 68 Pa. St. 338, Mr. Chief Justice Thompson says: "A fixed place, it seems to me, is as absolutely a requisite, according to the election laws, as is the time of voting. The holding of elections at the places fixed by law is not directory; it is mandatory, and cannot be omitted without error. I will not say that in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous ground as a matter of necessity — *necessitas non habet legem*. But then the necessity must be absolute; discarding all mere ideas of convenience. . . . To move the place of election three miles from that designated by law, or from a village and across a considerable stream a half a mile or more distant from the village where it ought to have been held, or from a designated school-house to a vacant house more than a half a mile distant therefrom, without authority or any absolutely controlling circumstances, must render the election therein

void, and if the votes taken be counted, constitute an undue election." (See, also, McCrary on Elections [3d ed.], §§ 123, 124; Paine on Elections, §§ 327-330.) The circumstances which do not affect the result when the place designated for the holding of the election has been changed are shown in *Preston v. Culbertson*, 58 Cal. 209, wherein the court holds: "The polls were opened a short distance from, and in plain view of the place appointed, the owner of the house selected having objected to the election proceeding at his house, and it does not appear that any voter was misled or deprived of his vote by reason of the change." (*Dale v. Irwin*, 78 Ill. 180.) There was no error in the action of the court respecting the returns from this precinct.

The third and last finding is as follows: "That at the precinct at Bonner, 66 illegal votes were cast for said office of sheriff, and which said number of votes are to be deducted from the whole vote of said precinct for said office; that said 66 illegal votes be apportioned to and deducted from the whole vote received by contestant, Daniel J. Heyfron, and contestee, Cain B. Mahoney, at said precinct of Bonner, in the same proportion that the vote of each of said parties bears to the whole vote cast at said precinct, to wit, 15 votes from the vote of contestant, Daniel J. Heyfron, and 51 votes from the vote of contestee, Cain B. Mahoney, leaving 120 votes cast for Cain B. Mahoney at said precinct, and 36 votes cast for contestant, Daniel J. Heyfron, at said precinct." It is the contention of the appellant that there is no testimony to prove that 66, or any other number of illegal votes were cast at this precinct for him for the office of sheriff, or for the office of sheriff. The statement of contest alleges that 120 "men, who were not legal voters of the county of Missoula, voted for said Cain B. Mahoney for sheriff." After giving a list of the names, the eleventh ground concludes: "Not one of the said men had been in the county of Missoula thirty days preceding said election, not one of them had been in the Territory of Montana six months preceding said election, and every one of them voted for Cain B. Mahoney at said election, and were counted for him by said board of canvassers." Another ground in the statement concerning some of the persons who voted for Mahoney for said office is stated

thus: "No one of whom had legally declared his intention to become a citizen of the United States prior to said election; no one of said persons went to the office of the clerk of the District Court to make said declaration; but the deputy of said clerk left his office, and took the declaration of each one of said persons in the county at a distance from his office, and that was the only declaration of such intention any one of them made." The finding of the court is general; the illegal voters are not named or otherwise identified, and the nature of the disqualification is not pointed out. There is no proof, outside of the official returns, that any ballots were cast for Mahoney or Heyfron. While we do not deem the evidence clear or satisfactory, there is testimony which tends to prove that laborers upon a railroad in the vicinity of the precinct at Bonner voted at this time, and that they had not resided in the county of Missoula thirty days before that election. The rule is settled by this court that the finding is like the verdict of a jury, and, under the circumstances appearing in the record, cannot be disturbed. We refrain, therefore, from an examination of the other ground, affecting the illegality of voters of foreign birth.

The appellant relies upon *McDaniels' Case*, Brightly's Leading Cases on Elections, 249, where it is said: "But if the individual do not know for whom he voted, and the fact cannot be established by other evidence, then the complaint must fail for want of proof, like any other cause which is lost for want of sufficient evidence to sustain it." This case, however, related to the illegality of only one voter, whose ballot would decide the contest, and the opinion states correctly the law which is applicable to the facts of that controversy, but has no bearing upon the question before us. Mr. McCrary says, in his work on Election: "But it does not follow that such illegal votes must necessarily be counted in making up the true result, because it cannot be ascertained for whom they were cast. In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division and not from the candidate having the largest number. Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each." (§ 460,

3d ed.) He continues: "Let it be understood that we are here referring to a case where it is found to be impossible, by the use of due diligence, to show for whom the illegal votes were cast." (§ 462.) Mr. Paine, in treating this subject, writes: "Where illegal votes have been cast, the true rule is to purge the poll by first proving for whom they were cast, and thus ascertain the real vote; but if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties." (Paine, Elec. § 513.) Under the authorities, it was proper for the court to exclude the entire vote of the precinct of Bonner, or apply the rule of apportionment to the facts. In either event, the same judgment would be entered against the appellant. While it may be the safer rule to reject the whole vote of a precinct which is tainted by fraud or illegality, we cannot conclude that the court erred in pursuing a different mode to arrive at a like end. The result of the findings was to give Mahoney 1,776 votes, and Heyfron 1,788 votes, and the contestant was declared elected to the office in dispute.

During the trial, Heyfron obtained leave to amend his statement of contest to conform to the proof by changing the following names, which are specified in the aforesaid eleventh ground, to wit: "William McCarthy to read William McGarry, W. Bugg to read N. Berg, Louis Gunther to read Louis Guenter, Wade Beck to read Wade Beach," etc. Eight names were also added to the list therein. The appellant insists that the court erred in allowing these amendments to be made. Mr. McCrary says: "It may be stated, as a general rule, recognized by all the courts of this country, that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. Immaterial defects in pleadings shall be disregarded; necessary and proper amendments should be allowed as promptly as possible." (§ 396, 3d ed.) "In most of the States of the Union, there are statutes to regulate pleadings, under which courts are authorized to allow amendments where petitions or other pleadings are found to be defective, and under most of these statutes a petition in a contested election case may be amended. In the absence of any

statute of this character, the court trying a case of contested election may, under its general common-law power, permit such a petition to be amended; and an amendment ought to be allowed whenever the court, in the exercise of a sound discretion, shall be of opinion that the ends of justice will be thereby promoted." (§ 406.) This author continues further: "If, therefore, an amendment of a petition would necessarily result in a continuance, or in considerable delay, it ought not to be permitted, because it is better that he whose fault it is that the original petition is insufficient should suffer than that an innocent party should be deprived of his right to a speedy trial. In such a case, the furtherance of justice requires that leave to amend should be refused." (§ 407.) In *Election Cases*, 65 Pa. St. 34, the court says: "And, in point of reason, why should the court not have power to amend in a contested election case? It is a judicial remedy, and concerns important rights. . . . It would be an intolerable technicality if the petitioners were required to set forth in their complaint, within ten days after the election, every illegal vote, every illegal act of the election boards, and every instance of fraud. Such a nicety would prevent investigation, and defeat the remedy itself." (See *Paine, Elec.* §§ 827, 840, and cases cited.) We have upheld in a liberal spirit the action of courts in permitting amendment to pleadings, and executing the provisions of the Code of Civil Procedure. Under the authorities, this principle embraces election contests. The effect of the first amendment was to correct the spelling of the names of persons, who could have been distinguished by the court without this change. The addition of the other parties was not sufficient to control the judgment. The appellant did not allege that he was surprised by this ruling, or ask for a continuance, and we do not think the court abused its discretion in this matter.

The court received in evidence a subpoena issued out of the office of the clerk of the court below in December, 1888, with the return of the coroner thereon, showing that he was unable to find 118 persons therein named. They comprise the names of the voters in the precinct of Bonner, against whom the contestant preferred the charge of illegality. The subpoena and return are *prima facie* evidence of some matters which are con-

nected with the case. They tended to prove that the contestant made a proper effort to secure the attendance of these witnesses, and explained his failure to produce them upon the trial, and enabled the court to understand the cause of the omission to bring before it the best evidence. Considered from any standpoint, we cannot see how their introduction prejudiced the appellant.

The judgment is affirmed with costs.

HARWOOD, J., and DE WITT, J., concur.

STATE, RESPONDENT, v. JACKSON, APPELLANT.

CRIMINAL LAW — Evidence — Portion of writing given in evidence the whole may be given. — It is not error to allow the State to read in evidence to the jury the whole of the testimony of the prosecuting witness, given at the preliminary examination, where a portion of such testimony has been so read by the defense.

COUNTY ATTORNEY — Notary public — Affidavit on motion for new trial. — A county attorney may hold the office of notary public, and it is no objection to an affidavit used by the State, on a motion for a new trial, that the notary before whom it was taken was the county attorney.

MOTION — Notice of motion. — The denial of a motion of the defendant to strike out an affidavit, proposed to be used by the State on the motion for a new trial, is not error, where no notice of such motion had been given, and the defendant refused to give any, and insisted that the hearing of the motion for a new trial should proceed forthwith. (Case of *Murray v. Larabie*, 8 Mont. 213, affirmed.)

CRIMINAL EVIDENCE — Proof of prejudice against accused. — There is no error in the refusal of the court to allow the defense to ask the prosecuting witness "whether she said that she would suicide if Jackson were not convicted," for the purpose of showing prejudice against the defendant, as such matter is wholly immaterial and its exclusion no injury to the defendant.

CRIMINAL TRIAL — Newspapers — Statutory construction. — The word "papers" in section 354, third division of the Compiled Statutes, providing that "a new trial shall be granted when the jury has received any evidence, papers, or documents not authorized by the court," refers to such written instruments as might be competent testimony when inspected by the court, and found to be competent under the rules of evidence, and does not include newspapers; and the reception by the jury of newspapers containing comments on the case does not, in itself, vitiate the verdict.

SAME — Misconduct of jury — Reading of newspapers — Presumption of prejudice not absolute. — Under subdivision 2 of section 354, third division, Compiled Statutes, providing that "a new trial shall be granted when the jury has been separated without leave of the court, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case," the reception by the jury of newspapers, containing comments on the trial adverse to the defendant, is misconduct tending to show injury to the defendant; but while prejudice is presumed, the presumption is not absolute and may be removed by the State, and

9	508
17	320
9	508
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23	479
33	480

for this purpose the testimony of the jurors, as to facts but not as to impressions, may be used. (*Cases of Territory v. Hart*, 7 Mont. 489; *Territory v. Clayton*, 8 Mont. 1.)

SAME—*Reading of newspapers by the jury.*—The presumption of injury to the defendant by the reading of a newspaper, containing comments adverse to the defendant, by one of the jury on the second and third days of a six days' trial, is sufficiently removed by the fact that the act was severely criticised by the judge in the presence of the jury, and the bailiff ordered to cut from newspapers thereafter coming into the possession of the jury all references to the trial; and it is no ground for a new trial that three days after the discharge of the jury a newspaper, of a date subsequent to the order of the court, containing comments on the trial, was found in the jury-room, where there is absolutely no proof that a jurymen ever read it.

Evidence reviewed and held sufficient to support a conviction of murder in the first degree.

Appeal from First Judicial District, Lewis and Clarke County.

The defendant was tried before HUNT, J.

Statement of the case, prepared by the judge who delivered the opinion.

The defendant was indicted, tried, convicted, and sentenced for the crime of murder in the first degree. He appeals from the judgment and from the order of the court denying the motion for a new trial. The grounds relied upon in his argument in this court are as follows:—

1. The verdict is not sustained by the evidence. The principal witness for the State, and the witness without whose testimony the case must utterly fail, was Mathilde Laveille, widow of the deceased. In an exhaustive examination and cross-examination of many hours, she testified minutely as to the facts of the homicide. She gave her evidence through the medium of an interpreter, she not speaking the English language well. The defense sought to impeach her and break down her evidence by endeavoring to prove contradictory statements and intrinsic inconsistencies. A portion of this effort was the introduction of her testimony given before the magistrate on the preliminary examination.

2. Defendant offered in evidence on the trial a portion of the record of the testimony of the witness, Mathilde Laveille, given before the magistrate; this for the purpose of contradicting her statements made on the trial in the District Court. This the court admitted, but with the ruling, made at the request of the

State, that the State might read the whole of her evidence given on the examination. This was done. This admission of the whole record, which was a written one, after admitting the portion which the defense chose to produce, is assigned as error.

3. Certain affidavits were used by the State on the motion for a new trial. They were taken before C. B. Nolan, a notary public of Lewis and Clarke County. Said Nolan was also county attorney for that county. The defendant objected to the use of these affidavits, on the ground that Nolan, being county attorney, could not also hold the office of notary public, and that his acts as notary public were void, and the papers were therefore not affidavits. The objection was overruled, and the defendant assigns error.

4. Upon the hearing of the motion for new trial, defendant moved to strike out one of the affidavits being used by the State, on the ground that it had been taken in Cascade County by a notary of the county of Lewis and Clarke, and offered to prove the fact, asserting that an affidavit taken out of the county for which the notary was appointed was void. No notice of such motion was given, and defendant declined to give any, and insisted that the hearing should proceed forthwith on the motion for new trial, and the court should exclude the affidavit alleged to be irregularly taken. The objection was overruled, and error is assigned.

5. Upon the trial the defendant's counsel asked the witness, Mathilde Laveille, whether she had not (giving time and place) said that she would commit suicide if Jackson were not convicted in this case. Counsel stated that he asked the question for the purpose of knowing whether the witness made such a statement, and was prepared to prove it if she denied it. This question was asked in connection and immediate context with other examination, by which counsel were endeavoring to show that the witness had a prejudice against the defendant. The question had just previously been put, "Is it not a fact that you are violently prejudiced against Jackson at the present time?" to which she had answered, "I do not like him now, because he put me in misery, but before that I had no ill-feeling against him whatever." The court excluded the question as to suicide. This is another error assigned.

6. The case was on trial ten days. The jury was impaneled March 12th. They retired for deliberation March 18th. The verdict was returned March 21st. It appears by the affidavit of Isaac Holbrook, bailiff of the jury, and by the affidavit of a newsboy, that on March 13th and 14th some of the jury obtained copies of daily newspapers, the Journal and the Independent. These papers contained accounts of the trial of the case, as it had proceeded, and also comments. The comments were interspersed in the account in the news columns. It is not necessary to recite these comments, but it is sufficient to say that they were adverse to the defendant as to the offense for which he was being tried. Holbrook further states that he knows that some of the jurymen read these accounts and comments. These objectionable newspapers got to the jurymen, in their editions of the 13th and 14th. The attention of the jury and the bailiff was then called to the matter in open court, and thereupon the bailiffs in charge of the jury were ordered by the court that all newspapers thereafter coming into the possession of the jurymen should have cut from them all references to the trial. This order was carried out. (An alleged infraction of this order is noticed, paragraph 7, *infra*.) Ten of the jury make affidavit that they have no recollection of ever, at any stage of the trial, having read any newspaper accounts or comments upon the trial, and that their verdict rendered was upon the evidence introduced on the trial, and was not affected in any manner whatsoever by outside influences of any character, because no such influences had any existence in fact. One other juror swears that he did read the accounts and comments; and the twelfth says that he may have glanced cursorily at them, but is not positive even of this. The last two also swear very positively that what they read, or may have read, made no impression upon them, and had no influence upon their verdict.

Counsel for appellant relies upon section 354, Criminal Practice Act: "A new trial shall be granted . . . when the jury has received any evidence, papers, or documents not authorized by the court." He contends: *First*. That, as it appears that the jury received these papers, it must be presumed that they read them; that they were influenced thereby, and injury to the defendant resulted; and that the jurymen cannot be heard to

rebut these presumptions, and a new trial must therefore be granted. *Second.* That even if this first position be not sustained, it does appear that these newspapers were read by at least one jurymen, and being so read, prejudice must be presumed from the nature of the newspaper articles, and the jurymen cannot be heard to say whether the article had any effect or influence on his mind in forming his verdict; that is, that even if it be held that the jurymen may testify as to facts, he cannot testify as to the effect of those facts on his mind.

7. On March 24th, three days after the jury had been discharged from the case, a newspaper of March 15th, a date subsequent to the admonition and order of the court as to excerpting all newspapers that might come into the possession of the jury, was found in the jury-room by the janitor and others. From the time of the discharge of the jury (the 21st) until the finding of this newspaper (the 24th) it does not appear that the room was locked, or that it was not open to whomsoever might come, including the defendant's friends. The newspaper thus found was uncut, and contained comments upon the trial. One of defendant's counsel was present when this paper was found, and called attention to it, and had it marked for identification. This is also assigned as misconduct of the jury, on receiving papers not authorized by the court.

R. G. Davies, and Edward C. Russel, for Appellant.

The jury received evidence, papers, and documents not authorized by the court. After the jury had been sworn they purchased and read the reports and comments of the newspapers without authority of the court, which reports and comments were of a nature calculated to prejudice the minds of the jury against the defendant, as well as statements of the evidence contained in said reports which were untrue. Newspapers were found in the jury-room after the court had prohibited the papers with accounts of the trial in them to be read. Two of the jurymen swear to having bought the papers and read them. Some courts presume that the objectionable matter was read by the jury. (*Bronson v. Metcalf*, 1 Disn. 21; *O'Brien v. Merchants' Fire Ins. Co.* 6 Jones & S. 432; *Durfee v. Eweland*, 8

Barb. 46; *Clark v. Whitaker*, 18 Conn. 548.) But there is no question in this case but that the jury, or some of them, read the articles in the papers, and if any of them read them it is sufficient. (*Hackley v. Hattie*, 3 Johns. 252.) The articles are of the strongest kind it was possible to write against the defendant; they are calculated to influence the jury, and were of the worst kind of communications for a jury to have. The Montana Statutes, page 464, section 354, subdivision first, reads: “. . . . A new trial shall be granted when the jury receives any evidence, papers, or documents not authorized by the court. The court did not authorize the receipt of these papers, and they come within the above provision.” (*Bassett’s Criminal Pleading*, p. 332, § 315; *People v. Thornton*, 74 Cal. 482; *Palmore v. State*, 29 Ark. 254.) In *Carter v. State*, 9 Lea, 440, where the bailiff allowed the jury to purchase newspapers having reference to the trial, a new trial was granted. A leading case upon the subject, and one to which the court’s attention is particularly called, is the case of *Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 49. This case was ably argued and decided by Judge Gray, one of the ablest judges of Massachusetts and now of the Supreme Bench of the United States. (See, also, 3 Wharton’s Criminal Law [6th ed.], p. 559, §§ 3136, 3137; *Walker v. State*, 37 Tex. 366; *Commonw. v. Landis*, 12 Phila. 576; *Bradbury v. Coney*, 62 Me. 223; 16 Am. Rep. 449, and notes; *Hix v. Drury*, 5 Pick. 302; *Whitney v. Whitman*, 5 Mass. 405; *Alger v. Thompson*, 1 Allen, 453; *Hunter v. State*, 43 Ga. 524; *Sargent v. Roberts*, 1 Pick. 341; *Killen v. Sistrunk*, 7 Ga. 294; *McDaniels v. McDaniels*, 40 Vt. 363; 11 Graham and Waterman on New Trials, p. 487; Hayne on New Trials, p. 190; *Holton v. State*, 2 Fla. 476; *Walker v. Hunter*, 17 Ga. 364, 399, 415; *Page v. Wheeler*, 5 N. H. 91; *Taylor v. Betsford*, 13 Johns. 487; Thompson on Trials, §§ 1955, 2623, 2627; *Brakefield v. State*, 1 Sneed, 219; *Williams v. Conrad*, 11 Humph. 415.) In criminal, especially capital cases, positive injury to defendant need not be shown if irregularity is satisfactorily proved. (*Eastwood v. People*, 3 Parker, Cr. C. 25, 45, 46, 48; *Commonw. v. McCaul*, 1 Va. Cas. 271; *Madden v. State*, 1 Kan. 340; *Whitney v. Whitman*, 5 Mass. 405; *Page v. Wheeler*, 5 N. H. 91; *Commonw. v. Roby*, 12 Pick. 496; *State v. Prescott*, 7

N. H. 287; *State v. Turner*, 39 Cal. 370; *People v. McKay*, 18 Johns. 212; *People v. Douglass*, 4 Cowen, 26; 15 Am. Dec. 432.) The State introduced affidavits of members of the jury, seeking to prove that the newspapers had produced no effect on their minds. "The better view is that the affidavits of jurors can only be received in support of their verdicts where they disclose facts, and not where they disclose mental processes of the jurors." (Thompson on Trials, p. 1995, § 2590. See Thompson on Trials, p. 1993, § 2660; *Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 49; *Taylor v. Everett*, 2 How. Pr. 23; *Thomas v. Chapman*, 45 Barb. 98.) Another ground of the motion for a new trial was that Nolan, the prosecuting attorney, acted as notary, and in one instance acted out of his county in taking one of the affidavits, the one made by the juror, Cooper. The defendant also objected to the reading of this affidavit on that ground, and offered to prove that fact, but the court refused to permit it and allowed the affidavit to be read, and defendant excepted. This was the same as if a witness had been produced and objection to his competency had been made. No notice was required to make this objection. Nolan should not have taken the affidavits: 1st. Because he was not and could not be a notary public. (1 Am. & Eng. Encycl. of Law, p. 307; Cooley on Constitutional Limitations [5th ed.], p. 748, n.; Const. Mont. p. 31, § 19; p. 37, § 35; p. 9, § 1.) 2d. Because one of them was taken outside of his county. (Comp. Stats. Mont. p. 1075, § 1560.) 3d. Because the two offices are incompatible. (Cooley's Constitutional Limitations [5th ed.], p. 748, n. [this is different from the library edition]; Comp. Stats. Mont. p. 1076, §§ 1572, 1573; p. 869, § 845.) There are no cases in the Montana reports where there was objection made to the introduction of the affidavits of jurors and the question made in this motion decided. There are two cases in which the jurors testified, but no objection appears to have been made. The prisoner should have been allowed to have these jurymen present. (Const. p. 7, § 16.) "Such affidavits should be closely scrutinized, and if the act complained of was of itself misconduct they will receive little weight." (*State v. Dolling*, 37 Wis. 398.) The next ground of the motion to which the court's attention is asked,

and on which the court erred in overruling said motion, is: Excluding the evidence that witness Mathilde Laveille said she would commit suicide if Jackson were not convicted. Questions aimed to show bias against defendant should be permitted, and jury is proper judge of such tendency, not the court. (*People v. Lee Ah Chuck*, 66 Cal. 662; 1 Greenleaf on Evidence, § 450; Wharton's Criminal Evidence, §§ 475-477; *Harper v. Lamping*, 33 Cal. 643; *People v. Blackwell*, 27 Cal. 67; *Jackson v. Feather R. W. Co.* 14 Cal. 24; *Dun v. People*, 29 N. Y. 523; 86 Am. Dec. 327; Best Prin. of Ev. p. 633, n.; *Territory v. Paul*, 2 Mont. 314.) The next error complained of is: The court erred in admitting the reading by the State of the whole of the testimony of witness, Mathilde Laveille, taken before the coroner and before the Probate Court, after introduction of part thereof by defense to impeach said witness. Where part of a conversation, testimony, or record is introduced in evidence by one party only, such other parts will be admitted as are relative to or explanatory of the parts read. (*Rouse v. Whited*, 25 N. Y. 170; 82 Am. Dec. 337, and note; *Webster v. Calden*, 55 Me. 170; Greenleaf on Evidence, § 467, p. 181; *Lynde v. McGregor*, 13 Allen, 172; *Houstine v. O'Donnell*, 5 Hun, 474; *Forrest v. Forrest*, 6 Duer, 124; *Grattan v. Metropolitan Ins. Co.* 92 N. Y. 274; *Dutton v. Woodman*, 9 Cush. 255; *Commonw. v. Keyes*, 11 Gray, 323.) New trial will be granted if illegal evidence or immaterial evidence has been improperly admitted. (Comp. Stats. Mont. p. 468, § 354; *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744, and note; *Cunliff v. Mayor of Albany*, 2 Barb. 194; *Boyle v. Coleman*, 13 Barb. 44, and cases cited; *People v. Parish*, 4 Denio, 156; *Ellis v. Short*, 21 Pick. 145; *State v. Allen*, 1 Hawks, 6; 9 Am. Dec. 616.)

Henri J. Haskell, Attorney-General, and *C. B. Nolan*, County Attorney, for the State, Respondent.

The first ground of error relied upon is the alleged misconduct of the jurors in reading newspapers calculated to produce upon them an unfavorable influence at the early stages of the trial. The affidavits relied upon do not show, except infer-

entially, that these papers were in fact read. If the affidavits, however, indisputably showed that such was the case, the affidavits of the jurors rebut the presumption that this misconduct tended in the remotest degree to prejudice the rights of the defendant. The unquestioned weight of authority is that a verdict will not be set aside because of an irregularity of this kind. The evidence in this case overwhelmingly establishes the fact that the defendant was not prejudiced in any way. (*Commonw. v. Roby*, 12 Pick. 496; *United States v. Reid*, 12 How. 107; *Flanagan v. State*, 64 Ga. 54; *People v. Williams*, 24 Cal. 31; *City of Chicago v. Dermody*, 61 Ill. 431; *State v. Cucuel*, 31 N. J. L. 251; *Morris v. Howe*, 36 Iowa, 490; *Territory v. Hart*, 7 Mont. 505; *Territory v. Clayton*, 8 Mont. 1.) The affidavits of the jurors disclose that in the case of eleven of them the accounts which the papers contained were not read by them; and in the case of the twelfth juror the reading was cursory, and no impression ever so evanescent was created. It is contended that the court erred in not sustaining defendant's motion to strike the affidavits of the jurors from the files upon the hearing on the motion for a new trial. The authorities hold that the affidavits of the jurors are admissible to sustain a verdict when there is an attempt made to impeach it. (*Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 49; *Bowler v. Inhabitants of Washington*, 62 Me. 303; Merriman and Thompson on Juries, §§ 394, 396, and note 2, p. 496; *Morris v. Howe*, 36 La. 490; *Riggins v. Brown*, 12 Ga. 271; *State v. Underwood*, 57 Mo. 40; Hayne on New Trial and Appeal, § 74, p. 274.) A diatribe against one the counsel printed in a newspaper and read by one of the jurors does not constitute a ground of error sufficient to set aside a verdict. (*Hunter v. State*, 43 Ga. 524.) As to the alleged error of the trial court in refusing to sustain the objection of the defendant to the admissibility of the affidavit of the juror, Cooper, because it was taken by Nolan, who was a notary public of Lewis and Clarke County, in Cascade County, the record discloses the fact that the proceedings had upon motion for a new trial were upon affidavit. The affidavit was regular upon its face and showed that it was taken in Lewis and Clarke County, and the court could not do otherwise than overrule the objection. (*Orr v. Haskell*, 2 Mont. 225.) It is contended

that because Nolan was a prosecuting attorney he could not act as notary public, under the constitution of the State recently adopted, and that the affidavit of the jurors for that reason should have been rejected upon motion, and that it was error not to do so. To support this, reference is had to section 1, article lv., under the heading, "Distribution of Powers"; but it will be readily seen that this section has no reference to the case at issue. That has reference solely and exclusively to the departments of the government which are co-ordinate, and has no reference to an officer acting in a dual capacity, if it might be so termed. The objection to the interrogatory put to Mrs. Laveille regarding her statement, to the effect that in case Jackson was not convicted she would commit suicide, was properly sustained. The question was certainly too remote for the purpose of showing a prejudice toward the defendant. The sixth ground of error is the admissibility of the testimony of Mrs. Laveille at the preliminary examination, and also at the coroner's inquest, for the purpose of sustaining her credibility, portions of this testimony being introduced for the purpose of impeachment. The very authorities cited in appellant's brief clearly show the competency of this evidence, and that no error was committed by the court in its admission. (*Rouse v. Whited*, 25 N. Y. 170; 82 Am. Dec. 344; *Haile v. Hill*, 13 Mo. 613.)

DE WITT, J.—The grounds set forth in the above statement are those presented on the argument on appeal, and we will consider them in their order.

1. It is true that the fate of the defendant depended, on the trial, upon the testimony of one witness, Mrs. Laveille. "The direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact except perjury and treason." (§ 616, p. 223, Comp. Laws.)

We have diligently, in view of the gravity of the offense and the character of the penalty, examined the 400 printed pages of evidence. Untiring efforts were made by defendant's counsel to impeach, discredit, and contradict the testimony of this one witness. Counsel cite numerous instances of what they claim to be inconsistencies and contradictions. Her testimony is given us in full, by question and answer, as is proper in a

capital case where the verdict depends absolutely upon the truth or falsity of the testimony of one person. In her testimony contradictions may be found by selecting isolated fragments and comparing them with like fragments in other portions of the record. Inconsistencies can be constructed by partially viewing segregated statements. Such can be done with the lengthy testimony of the most learned experts and scientific specialists. The witness here was an unlearned woman, speaking in a foreign language, through an interpreter, making her statements contemporaneous with the tragedy from the maze of overwhelming grief and under terrible excitement. It is impossible, in this opinion, to recite, or even epitomize, the mass of testimony, which occupied in the hearing six days. We can only say that a faithful and painstaking scrutiny of the record reveals the fact, beyond cavil or controversy, that Mrs. Laveille's testimony fully meets the rule of substantial truth with circumstantial variety. We are amply satisfied that her testimony, if true, sustains the verdict. The jury have said it was true. They not only heard her, but saw her, and the manner in which she testified. The court below, in hearing the motion for a new trial, found in the record no substantial attack upon the truth of her testimony. We find nothing upon which we can disturb the decision of that court that the verdict was supported by the evidence.

2. The defendant offered and read in evidence a portion of the testimony given by Mrs. Laveille at the preliminary examination, which had been reduced to writing, read to the witness, and by her subscribed. We are of opinion that it was not error in the court allowing the State to read to the jury the whole of that testimony. The rule is: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other. When a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (§ 626, p. 224, Comp. Laws.)

3. As to the point that Nolan, county attorney, could not be or act as notary public, counsel refer to article viii., section 19, Constitution, which provides that the qualifications of one to be

county attorney "shall be the same as are required by a judge of the District Court, except that he must be over twenty-one years of age, but need not be twenty-five years of age;" and section 35: "No district judge shall hold any other public office while he remains in the office to which he has been elected or appointed."

It is perfectly clear that the first section cited simply prescribes the requirements for eligibility to election as county attorney as to age, residence, attainments, etc. The second section is a prohibition against a district judge holding another office—a prohibition not including the county attorney. If among the qualifications of one to hold the office of county attorney had been one "that he shall not hold any other office," there might be some force in counsel's contention. Section 31, same article, provides: "No judge of any District Court shall act or practice as an attorney or counselor at law in any court in this State during his continuance in office." This is another prohibition directed against the district judge. As well might counsel insist that this applies to the qualifications of the county attorney. A constitutional regulation as to the conduct of the district judge is not part of the description of the qualifications for office of county attorney. This view of counsel as to the constitution of the State is wholly without merit.

Upon this point counsel also cite section 1, article iv., Constitution: "The powers of the government of this State are divided into three distinct departments—the legislative, executive, and judicial; and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Counsel's view of this section must be that Nolan, as county attorney, and Nolan, as notary public, was acting in the exercise of the powers of two of the different departments of the government at once. It is not entirely clear how counsel classes the two positions of Nolan in two different departments. The county attorney is provided for in article viii. on judicial departments. If counsel takes the position that the county attorney

is of the judicial department, then does he mean that as notary public he belongs to the executive or legislative department? The statement of the proposition answers itself.

4. The court properly denied the motion of the defendant to strike out the affidavit proposed to be used by the county attorney on the motion for a new trial. The State had no notice of such motion. Defendant declined to give any, and insisted that the hearing of the motion for new trial should proceed forthwith. The State was entitled to some intimation that the defendant objected to the formalities in the taking of this affidavit prior to the moment of the hearing of the motion for the new trial. (*Murray v. Larabie*, 8 Mont. 213.)

5. We are of opinion that the court properly excluded the interrogation to Mrs. Laveille whether she said that she would suicide if Jackson were not convicted. It is apparent from the context of the examination at that point, and it is now insisted by defendant's counsel, that the question was asked for the purpose of showing prejudice by the witness against the defendant. It is not at all apparent that such statement, if it were made, and such sentiment, if it existed, would indicate any prejudice. The witness had already just frankly admitted the existence of ill-feeling towards defendant. We consider the matter offered wholly immaterial, and its exclusion no injury to defendant.

6. "A new trial shall be granted when the jury receive any evidence, papers, or documents not authorized by the court." (§ 354, Crim. Prac. Act.)

Defendant's counsel construes the word "papers," above, to mean "newspapers"; and from that premise he argues that if a juryman receives a newspaper containing comments upon the trial, the verdict *ipso facto* must be set aside. If the word "papers" means "newspapers," counsel need not qualify the word by adding, "containing comments on the trial." If he reads the statute liberally, or by supplying the word "newspaper" for "paper" therein, then the reception of a newspaper would, in itself, vitiate the verdict. We are of opinion that the word "papers" in the statute does not mean "newspapers," or, perhaps, even include them. The statute is not a prohibition against the jury receiving evidence, papers, or documents. Cases

are tried upon evidence, papers, and documents (using the word "papers" in the sense of written instruments or documents). But the jury shall receive only such evidence, papers, and documents as are authorized by the court. Cases are not tried upon newspaper comments or arguments. Such cannot become evidence under any circumstances. It would be an idle thing for the statute to say that no newspaper argument shall be received by the jury except those authorized by the court. Such newspaper lubrications could never be authorized by the court. Cases are presented to juries in another manner, by evidence and oral argument in open court. Counsel would construe the statute to make it prohibit the jury from hearing or reading, *ex parte*, private newspaper argument of a case. Of course, they shall not hear such, or determine cases in that manner. To do so is such an infraction of constitutional and established rights of jury trial that we cannot believe that the legislature went so far from the subject as to intend to prohibit, in this section, that which is otherwise so amply inhibited by the whole system of criminal procedure.

The intent of this section is clear to us. The word "papers" occurs in context, between the words "evidence" and "documents." It refers to something, as written instruments, for instance, which might be competent testimony if scrutinized by the court, and found by the court to be competent, under the rules of evidence, and then authorized by the court to be introduced. If it gets to the jury without such authorization, it falls within the purview of the section being considered. Papers, documents, and written instruments are all, under some circumstances, evidence. Newspaper comments are never such. If the statute had used simply the word "evidence," it would have been sufficient. The addition of the words "papers" and "documents" simply makes it more explicit in the way of definition. The intent of the statute is simply to provide that evidence, whether oral, written, printed, or contained in papers or documents, shall not go to the jury without passing the scrutiny of the court as to its competency, etc., and undergoing the criticism of the argument of counsel.

: We do not justify the reception by the jury of newspaper comments. We only hold that this offense by a jury does not

fall within the inhibitions of this section (subd. 1, § 354, Crim. Prac. Act), but is governed by another division of the section noticed *infra*.

We have gone into this discussion in order to lay the foundation for our view, that the simple reception by a juror of a newspaper does not *ipso facto* vitiate the verdict, but that such reception must be considered as any other misconduct of a jury, and be treated by the rules governing cases of misconduct. The section of the law applicable is section 354, subdivision 2, Criminal Practice Act. "A new trial shall be granted when the jury has been separated without leave of the court, or have been guilty of any misconduct, tending to prevent a fair and due consideration of the case."

There is a conflict in the decisions of courts as to the rules applicable to determining the question of setting aside a verdict for alleged misconduct of the jury in a criminal case. An extreme view is, that misconduct tending to show injury to defendant being shown, prejudice will be absolutely presumed, and a new trial granted, and the jurors will not be heard to deny the alleged facts of misconduct. This doctrine has not been adopted in this court. (*Territory v. Hart*, 7 Mont. 489; *Territory v. Clayton*, 8 Mont. 1.) The position towards which this court tends in those cases, and which we now approve, is that if misconduct be shown, tending to injure defendant, prejudice to the defendant is presumed, but not absolutely. The State may remove that presumption, and the burden is upon it to do so, and in so doing, it may use the testimony of the jurors to show facts which prove that prejudice or injury did not or could not occur. For example, if a juror is temporarily separated from his fellows, by illness or the exigencies of nature, he may show that during such separation he saw or talked to no one, and that no influences were brought to bear upon him of any character. This court, however, has never held, and does not now hold, that if the contact of the juror with outside, prejudicial influences be clearly demonstrated and uncontroverted, the juror may purge himself by testifying that such influences did not affect his judgment in forming his verdict. This principle is well reviewed by Mr. Justice Gray in *Woodward v. Leavitt*, 107 Mass. 453.

In the case before us it is clearly shown that only one juror read the objectionable newspapers. For the purposes of this decision we will not consider his affidavit that he was not influenced thereby. The difficulty is soluble on other grounds. The reason for holding that the reading by jurymen of newspaper accounts and comments adverse and prejudicial to defendant vitiates a verdict, is that they are *ex parte* arguments and presentations of the case, made out of court, not under oath, made irresponsibly, not answerably by defendant by evidence or argument, and not subject to the rules of court as to admission of evidence and the proper argument of counsel.

The efforts of learned and zealous counsel for the State, in open court, are far more dangerous to a defendant than the diatribe of any newspaper; but they are made under the eye of a vigilant court, under the established rules of procedure, and with the ever-present opportunity of the defendant to put a telling shot under the armor of the State wherever a joint is left loose.

In the case at bar the newspaper was read by the jurymen the second or third day of a six days' trial, before the State had closed its evidence, and before the defendant had opened his defense. The attention of the court was called to the matter, and the judge immediately animadverted upon it in the presence of the jury. The jury had opportunity to be fully advised by the court, and to learn that the newspapers, and all their comments, should be excluded from their consideration. They were thereafter so excluded, and, indeed, at no time did the jurymen ever discuss them. After this admonition by the court, they heard evidence for four days, including the whole of the defense, as well as the arguments of defendant's counsel, who had full opportunity to score the newspapers.

A juror examined upon his *voir dire* may have read the most violent and prejudicial newspaper attacks upon the defendant, and have formed an opinion of the guilt of defendant, and still he is a competent juror if he "state on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, and the court is satisfied that he is impartial and will render such verdict." (§ 287, Crim. Prac. Act.) The day has passed when blank ignorance and stupidity

in a juryman were his best qualifications for service. There is more intelligence on the modern jury; and intelligent persons, the statute contemplates, are able to read contemporary history, and still preserve their mental balance.

On the trial of a case, highly improper and incompetent testimony may accidentally fall from the lips of a sworn witness on the stand. This occurs in nearly every trial. Such evidence is stricken out by the court, and the jury instructed to disregard it. The court herein had equal opportunity to correct any possible evil influence of the newspapers.

If these newspapers had gotten to the jury after they retired for deliberation; if the court never had known of the fact, and never had opportunity to admonish the jury; if it had been too late for the jury to hear the defendant's evidence and the arguments of his counsel, the possibility of injury and prejudice would be more apparent.

The ultimate inquiry for the court is, whether prejudice or injury has occurred; whether the same be by an absolute presumption, or by a view of facts presented by competent testimony. Cases must rest, to some extent, upon their own particular facts. Under all of the facts of the case at bar we cannot hold that prejudice or injury must be absolutely presumed, and we cannot hold that they in any manner appear.

7. The last point contended for by appellant scarcely calls for notice. Three days after the jury had been discharged, and had abandoned their room, a room, for all that appears, open to every one, and, in any event, open to the janitor and one of defendant's counsel and another person, a newspaper was found in that room, unmutilated, of date March 15th. This has not the slightest tendency to prove that a juryman ever saw it.

There has been a warm contention in this case over the conduct of newspapers in commenting upon the trial during its progress. The Helena Journal, published March 13th, has the following head lines: "Evidence Given that is likely to Hang Jackson. Mrs. Laveille's Convincing Story. Looks Bad for Jackson." The article says, among other things: "Jackson sat through the process of weaving the rope that shall stretch his neck with apparent unconcern and smiling indifference;"

“Cumulative evidence that Jackson should be hanged;” “The halter draws,” etc. This paper also contains the following, in reference to one of defendant’s counsel: “His chances for hanging have been materially augmented by the addition of a certain Casey to the lawyers for the defense. Casey has no seat at the table for counsel, but crowds himself up against their chairs, and confers with the amateur short-hand writers, occasionally interfering with the work of Messrs. Davies and Russel.”

We cannot leave this decision without a further word. Newspapers occupy a magnificent place in modern civilization. In England, the press has been called “the fourth estate of the realm.” With all their faults, even with their occasional venality, and their vice of the adulteration of intelligence for ulterior purposes, newspapers are one of the bulwarks of liberty. The freedom accorded them in the discussion of all matters sends vice blushing into seclusion, makes the rogue in high places tremble for his security, and the public robber hesitate in his depredations. Journalism calls to its service the best intellectual effort of the earth.

But let it remember that the citizen is innocent until a jury of his countrymen pronounce him guilty. However humble his station, and however crime-stained he appear, he is a citizen and an innocent man until he is found to be otherwise by the machinery of the law which the people have set up to determine that fact. He is not to be tried by hue and cry, or by newspaper harangue. The wisdom of centuries has provided a method of trial which the people of this land have sanctioned by solemn constitution. Let that method prevail.

The lapses of the newspapers in this case were doubtless through inadvertence. But they might have occurred at a time when they would have worked an injury to a fellow-citizen on trial for his life, and in the eye of the law, as yet innocent as if he were in the highest of earth’s stations. It is hoped that hereafter, when criminal cases are on trial, the machinery of the courts will be left undisturbed to work out the equal and exact justice which their creation and existence contemplate.

The judgment of the District Court, and the order denying a

motion for a new trial, are affirmed; and it is directed that the judgment be carried into effect as entered in the court below.

BLAKE, C. J., and HARWOOD, J., concur.

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35*	243
36*	194

PARROTT, RESPONDENT, v. HUNGELBURGER, APPELLANT.

ERECTMENT — Landlord and tenant — Possession at the time of the execution of the lease. — Under the rules of law, a lessee, though in possession at the time of the making of the lease, cannot, in the absence of deception, fraud, or duress, deny the landlord's title; and also under the provisions of section 87 of the Code of Civil Procedure, providing, in substance, that when the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord.

ERECTMENT — Value of improvements — Offset. — Where the court found in the case at bar that "the evidence on the part of the defendant also shows the erection of improvements on the lot in controversy, the value of which is variously estimated by different witnesses at from four hundred to one thousand dollars," and the replication admitted improvements of the value of four hundred dollars, held, that the sum of four hundred dollars should be offset against the judgment for rents and profits.

Appeal from Second Judicial District, Deer Lodge County.

The cause was tried before DE WOLFE, J., without a jury.

Cole & Whitehill, for Appellant.

The District Court erred in refusing to find that the defendant had an equitable title to the premises through her former husband from James Walsh. (*Story v. Black*, 5 Mont. 48; *Jones v. Marks*, 47 Cal. 243; *Bodley v. Ferguson*, 30 Cal. 512; *Ray v. Birdseye*, 5 Denio, 626; *Hughes v. United States*, 4 Wall. 232.) It was claimed in the court below that the appellant was estopped from denying respondent's title to the premises, from the fact that her husband had signed the leases set out in the transcript and paid rent thereunder. The doctrine of estoppel does not apply in such a case. The accepting of a lease by a

party in possession of real estate from a person out of possession does not preclude the former from denying the latter's title. (*Teoksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 558; *Pacific M. L. Ins. Co. v. Stroup*, 63 Cal. 150.) The District Court erred in offsetting improvements which were proved to be permanent, and of the value of one thousand dollars, against the rents. (Comp. Laws, p. 160, § 369.) Permanent improvements are a set-off against rents and profits if placed on the premises in good faith. The answer sets out the improvements made, and the value thereof, while the evidence adduced on the trial proved that the appellant and her husband went into the possession of the premises under a claim of title and built the improvements. (Sedgwick & Wait's Trial of Title to Land, § 694.) It is claimed by the respondent that the value of the improvements is not technically set out in the answer, so that the defendant can avail herself of that defense. If this were true, no objection was made to the pleading by demurrer or otherwise, and the case was tried on the theory that permanent improvements had been made, and a number of witnesses were sworn as to the value thereof, and no objection was made to this character of proof by the respondent. It is now too late to object to the effect of such evidence. (*Anderson v. Fisk*, 36 Cal. 633.)

Robinson & Stapleton, for Respondent.

Appellant claims that the court should have found that she establish an equitable title to the property, and erred in not so finding. This involves a question as to the evidence, etc., and cannot be considered by this court in an appeal from the judgment, but can be considered only on appeal from an order overruling a motion for new trial. This has been invariably so held by this court. But even if the court can consider the question at all, then, at most, there was a conflict in the evidence, and the findings will not be disturbed. This is too well settled to require a citation of authorities. The appellant, by her own evidence, fails to show such a state of facts as would warrant the court in finding that she had such equitable right, that is, there had been such a parol contract, and going into possession and putting

improvements on the lot by her claimed grantor and the party under whom she claims, Hungelburger, her late husband from whom she has been divorced. When a party relies on a parol contract, in such case the evidence must be clear and convincing. (Pomeroy on Specific Performance of Contracts, § 136.) The allegations of the contract in the answer are not sufficient to warrant the finding of such contract. (Pomeroy on Specific Performance of Contracts, §§ 107, 108, 127.) The contract was not made by Mrs. Hungelburger, but between her husband and Walsh, prior to the marriage between them, and appellant cannot avail herself of the benefits of it. Appellant has shown no right except the decree of the court in divorce proceedings giving her this property as alimony. It is shown that during all the time the appellant and Joseph Hungelburger held the property under lease, and recognized the title of Walsh and his grantees, and hence she cannot now set up an adverse claim to it. These several leases show the facts in the case. Then, as we said, the court cannot consider the evidence on appeal from the judgment. The appellant failed to plead her improvements as an offset to rents and profits, and for this alone, such claim was properly rejected by the court, and there was no error therein. (See Sedgwick & Wait's Trial of Title to Land, § 714; *Love v. Shartz*, 31 Cal. 490; *Carpenter v. Small*, 35 Cal. 355; Code Civ. Proc. § 369.)

HARWOOD, J. — This is an action, in the nature of ejectment, to recover possession of a lot of land described in plaintiff's complaint, situate in the town of Anaconda, Deer Lodge County, Montana.

The questions involved in this appeal were argued and submitted to the territorial Supreme Court at the July term, 1889, and judgment was rendered. At the time of the rendition of the judgment, however, it was suggested by counsel that appellant had died since the submission of the case, and shortly before judgment was rendered. Thereupon the court made an order setting aside the judgment rendered in the Supreme Court, and placed the case upon the calendar for further proceedings. An administrator of deceased having been appointed and substituted in place of appellant, the case was again submitted for decision at the present term.

The complaint avers the plaintiff's ownership and right of possession of the described premises since October 1, 1886; that defendant since said date has held and occupied said premises, and still holds and occupies the same, against the will and consent of plaintiff; and that the rents and profits have since said date, and will be, while unlawfully held by defendant, of the value of thirty dollars per month.

The defendant's answer denies the plaintiff's allegations of ownership, and his right to possession of said premises, or any part thereof, and for further defense alleges ownership thereof in herself since February 1, 1884, and possession and right of possession since that date, and specifies that on or about the ——— day of February, 1884, one D. M. Walsh was the owner of, and in possession of, said premises; that on or about that date said Walsh sold said premises to defendant and her husband, Joseph Hungelburger, for the sum of three hundred dollars, and delivered possession thereof to them; that defendant and her husband went into possession under said contract of purchase, and have ever since occupied, held, and possessed said premises, and paid the taxes thereon, "and greatly increased the value of said premises, and erected thereon tenements and buildings of the value of one thousand dollars;" that plaintiff, and his grantors and predecessors in interest, well knew of defendant's ownership and occupation of said premises. And on information and belief, defendant alleged that plaintiff was not a purchaser in good faith, for a valuable consideration, but that he and his grantors, well knowing defendant's rights in said property, procured a deed therefor from said Walsh for the purpose of setting up a fraudulent claim to said premises; that on or about December 24, 1886, in the same court where this action was pending, defendant obtained a decree of divorce from her said husband, Joseph Hungelburger, and among other things it was adjudged that this defendant have in her own right the premises described in the complaint.

The plaintiff, by replication, denied that the defendant or her husband ever purchased said property from Walsh, and on information and belief denied the payment of taxes thereon by defendant, or the putting of improvements thereon of any value greater than four hundred dollars; and alleged that the only

right or interest ever owned or held in said premises by defendant or her husband was a leasehold interest, and that they held the same as tenants of said Walsh and his grantors, Barker and others, and that said lease had expired by its own terms prior to the commencement of this action. Plaintiff further alleged good faith in the purchase of said property, and the payment of a valuable consideration therefor, and denied all knowledge of any claim thereto by defendant or her said husband except as tenants of said Walsh and his grantors.

The action was tried before the court without a jury. To support his claim of title to said land, the plaintiff introduced in evidence deeds of conveyance thereof showing a chain of title as follows:—

1. A deed from J. M. Walsh to B. J. Schlessinger, dated June 3, 1883, recorded June 9, 1884.

2. A deed from B. J. Schlessinger and wife to Julius J. Mack, dated September 1, 1884, recorded September 5, 1884.

3. A deed from Julius J. Mack to John W. Barker, dated December 29, 1884, and recorded February 2, 1885. Objection was made by defendant to the introduction of the last-mentioned deed, and, on the reception of it over such objection, excepted, and assigns the same as error, which will be hereafter treated.

4. A deed was introduced showing a conveyance of said premises from John W. Barker, Jr., and wife to William E. Barker and Frank C. Kinney, dated February 11, 1885, recorded March 10, 1885.

5. A deed from William E. Barker, conveying one-half interest in said land to Frank C. Kinney, dated June 11, 1886, recorded June 12, 1886.

6. A deed from Frank C. Kinney, conveying said premises to the plaintiff, George Parrott, dated September 7, 1886, recorded September 10, 1886.

7. A deed from Marcus Daly and wife, conveying said premises to J. M. Walsh, dated November 1, 1883.

The objection made to the introduction of said deed from Julius J. Mack to John W. Barker was made on the ground that the acknowledgment of the execution thereof was not made and executed according to the laws of Montana. When this objec-

tion was interposed, plaintiff offered to prove the signature of the grantor by George W. Stapleton. The defendant objected to such proof on the ground that said Stapleton was not the subscribing witness mentioned in said deed, and that the execution thereof must first be proved by the subscribing witness, or his absence accounted for. The court overruled the latter objection, to which ruling defendant excepted; and the testimony of Stapleton to the signature of said grantor, Mack, was admitted, and the deed so proved was admitted to be read in evidence, over the objection of defendant, to which exception was saved, and the action of the court therein is assigned as error.

Before considering the above assignments of error, we will examine all the evidence introduced, and see whether the defendant can be permitted to assail the plaintiff's title to said land while in possession, and as a defense to an action for recovery of possession.

The defendant, to maintain her defense, testified that she was married to Joseph Hungelburger, sometime in the year 1884, and sometime in February of that year she was present in her husband's barber shop when D. M. Walsh and her husband had a conversation, in which Walsh proposed to sell the lot in controversy to her husband for three hundred dollars, and that Hungelburger agreed to take it, and paid Walsh two hundred and fifty dollars, at the same time taking a receipt for the payment; that defendant had said receipt in her possession for a time, but it was either "lost or stolen," and that she was unable to find it; that the receipt read as follows: "Paid two hundred and fifty dollars on lot No. 2, block 6, Anaconda; fifty dollars due." This transaction was asserted by defendant as a basis of her claim to said lot, and, taken together, with the decree of the court mentioned in defendant's answer, by which defendant was decreed all of Joseph Hungelburger's right in said premises, constitutes defendant's claim upon said premises. There was other evidence introduced on behalf of defendant, in respect to improvements put on said lot by Joseph Hungelburger, and in respect to said alleged sale and receipt.

In the plaintiff's replication, he has controverted defendant's alleged ownership of said lot, and had alleged that defendant and her husband, Joseph, were in possession of said lot "as

tenants of Walsh and his grantors, Barker and others, and that the leasehold term had expired."

When defendant closed her proof, plaintiff introduced a witness, Barker, who testified that Joseph Hungelburger had paid him rent for said premises, at the rate of thirty dollars per month, from January, 1885, to August or September, 1886, a period of more than eighteen months; that on one occasion witness showed Joseph Hungelburger the deed by which said premises were conveyed to witness; that certain leases were made in writing between said Joseph Hungelburger and certain grantees of said lot in the line of deeds above set forth. These leases were proved, and introduced in evidence.

The first lease is dated January 5, 1885, and executed by John W. Barker, Jr., of the first part, and Joseph Hungelburger of the second part, which provides that said premises are "rented" unto the party of the second part from January 1, 1885, to May 1, 1885, for a certain stipulated rent, and containing a condition for the surrender of the peaceable possession of said premises to the lessor at the end of the term.

The second lease introduced by plaintiff bears date May 1, 1885, and is executed by William Barker and Frank Kinney, lessors, to said Joseph Hungelburger and one William Gale, lessees. The lease provides for a term of one year, from May 1, 1885, to May 1, 1886, at the rental of three hundred and sixty dollars, payable in installments of thirty dollars per month in advance, with covenant to deliver up possession of said premises at the end of the term.

The third lease bears date July 14, 1885, and is executed by William Barker and Frank Kinney, as lessors, to Joseph Hungelburger, lessee of said premises, for the term of nine months, from August 1, 1885, to May 1, 1886, at the rent of two hundred and seventy dollars, payable in items of thirty dollars per month in advance. This lease contains numerous conditions, among which it was provided that the lessors may enter into possession "to view and expel the lessee for non-payment of rent as aforesaid," and the further covenant "to quit and deliver up the premises to the lessors, or their agent or attorney, peaceably and quietly, at the end of the term," and "to pay the rent during the term, and also the rent, as

above stated, for such further time as the lessee shall hold the same."

These leases were admitted in evidence without objection.

Judgment was rendered in favor of plaintiff for the recovery of possession of the premises in controversy, with judgment for damages against the defendant for rents and profits during the time of detention, amounting to the sum of seven hundred and fifty dollars and costs of suit. The defendant appealed from the judgment.

The question now arises as to whether or not the defendant, who simply occupied the position of Joseph Hungelburger in respect to the possession of said premises, may, while occupying such possession, be permitted to set up a hostile title, and controvert the title of plaintiff and his grantors, or whether the defendant is not estopped, by virtue of said leases and the relation of landlord and tenant, from denying or assailing the title of plaintiff's grantors while defendant remains in such possession.

The general rule, so often asserted in adjudicated cases and by elementary writers, that, where the relation of landlord and tenant exists, the tenant is not permitted, while holding possession under that relation, to deny or attack the landlord's title, would seem to apply here, and cut off the inquiry into plaintiff's title back of Barker and Kinney, who leased to Hungelburger. The effect of this general rule would narrow the controversy in this action to inquiry into plaintiff's grant from Kinney and Barker. But there are some exceptions to the general rule—such, for instance, as where the lessee is imposed upon, and, through deception, fraud, or duress, is induced to take a lease—in which cases he is held not bound by the rule, and among these exceptions, counsel for defendant insists, is included the case where a party is in possession when the lease is made, and that in such a case the lessee is still at liberty at any time, even while holding possession, to attack the landlord's title. Upon this point defendant's counsel cite *Tewksbury v. Magraff*, 33 Cal. 237, and *Franklin v. Merida*, 35 Cal. 557. These cases are certainly in point. The position taken in the first case was strongly resisted by counsel when the second case, of *Franklin v. Merida*, involving the same question, reached the Supreme Court. In the latter case the court again held the same doctrine in an elaborate opinion, Judge Sawyer dissenting in both cases.

This exception declared by the Supreme Court of California, we think, is a new one, for it is scarcely met with in the numerous other authorities and cases where the general rule and its exceptions have been carefully considered. (Wood on Landlord and Tenant, § 236, p. 368, and cases there collected and cited; Taylor on Landlord and Tenant, § 90, et seq., and cases cited; 1 Washburn on Real Property [5th ed.], 588-601, and cases cited.) And, indeed, in the spirited consideration of the doctrine declared by the Supreme Court of California, the citation of authorities in support of it are few; and in our opinion the doctrine, if taken from the two English cases cited, must be adopted by inference, rather than taken from direct declarations involved in the decision of those cases. (*Cornish v. Searell*, 8 Barn. & C. 471; *Phillips v. Pearce*, 5 Barn. & C. 433.)

Mr. Washburn, in his valuable work on Real Property, in treating of this subject, refers to and criticises the doctrine held in *Tewksbury v. Magraff* and *Franklin v. Merida*, *supra*, in the following passage: "Where the tenant, having himself title and possession of the land, has been induced by fraud, misrepresentation, or mistake to take a lease, it seems well settled that he is not bound by the estoppel, and need not restore possession before disputing his landlord's claims. It has, however, been held, in some recent, elaborately considered cases, that a bare possession will enable him to do this, and that neither fraud nor mistake need exist. But this doctrine has been considerably limited in the court which declared it, and is not sustained by the general current of authority." (1 Washburn on Real Property [5th ed.], 599.) It is also observed, in the note to the above passage, that "some of the cases cited by the court rest on quite different grounds."

The cases referred to by Mr. Washburn, in which he calls attention to the fact that the "doctrine has been considerably limited in the court which declared it," are *Mason v. Wolff*, 40 Cal. 246; *Peralta v. Ginochio*, 47 Cal. 459; *Holloway v. Gallicio*, 47 Cal. 474; *Abbey H. Assoc. v. Willard*, 48 Cal. 614.

Under the rule contended for by appellant, a party may get into possession, and, being in possession, may voluntarily, and apparently in good faith, enter into a lease, and, by the strongest and most solemn declarations, covenant to pay rent, and

peaceably surrender possession at the close of the term, and at the same time be secretly holding, or claiming to hold, an adverse title, as in the case at bar, and suppress all notice of such adverse claims, with intent to mislead the landlord, and so continue until a convenient time and opportunity arrives, when the evidence bearing on the controversy is lost or destroyed, or beyond the reach of his adversary, or witnesses have perished, or perhaps, in the lapse of time, a stranger has come into the title, entirely unacquainted with the facts surrounding the impending controversy, and then, when all the events advantageous to the lessee's position, and detrimental to the landlord's position, have come to pass, still holding possession, the tenant may assert his long suppressed and delayed claim to adverse title.

We do not believe that we overstate the consequences which may attend this rule, for other equally unjust consequences can readily be suggested.

In respect to the relation of landlord and tenant the statute of this State provides: "When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord; but such presumptions cannot be made after the periods herein limited." (Code Civ. Proc. § 37.)

It cannot be denied that the relation of landlord and tenant existed between Joseph Hungelburger, lessee, and William Barker and Frank C. Kinney, to the end of the term, May 1, 1886, nor that defendant, who says that she held possession with her husband, and claims to have succeeded to his rights in the premises, stands in any other relation; and she says she has held the possession continuously since that time.

The statute, and the rules of law applying, make the possession of the tenant the possession of the landlord; and we hold that while continuing in that possession the defendant cannot be permitted to revolt against the acknowledged landlord's title, and set up an opposition title. It follows that the assignments

of error in reference to the execution and acknowledgment of said deed from Mack to J. W. Barker, Jr., is not necessarily to be considered herein, as that relates to the title of defendant's lessors; that the plaintiff, having proved a valid conveyance of said premises from said lessors to him, together with the relation of landlord and tenant existing as above set forth, is entitled to recover possession of said premises in this action.

The appellant contends that the court erred in not offsetting the value of improvements as proved by the evidence against the amount of damages adjudged for rents and profits.

We think the defendant's answer is subject to criticism as having failed to fully set forth that these improvements were made in good faith, "under cover of title." In declaring title in herself the defendant did allege "that defendant, since her occupation of said premises, has paid the taxes thereon, and has greatly increased the value of said premises, and has erected thereon tenements and buildings of the value of one thousand dollars." The replication on this point denies "that defendant put any improvements on said premises, or that her said husband put any improvements thereon, to exceed the value of four hundred dollars." The court found that "the evidence on the part of defendant also shows the erection of improvements on the lot in controversy, the value of which is variously estimated by different witnesses at from four hundred to one thousand dollars."

Taking the pleadings together with the finding of the court, although not specific as to the exact value of the improvements, we believe the amount of four hundred dollars should be offset against the judgment for rents and profits, and the judgment reduced by that amount, and it is here so ordered. The appellant contends that as some witnesses estimated the improvements of the value of one thousand dollars, the court should have found that value. A sufficient answer to this complaint is that the record does not show that there was any request for specific findings on that or any point, nor that any motion was made to make the findings more definite.

It is ordered that the judgment be modified as herein directed, and as modified the judgment of the trial court is affirmed.

BLAKE, C. J., and DE WITT, J., concur.

MILBURN MANUFACTURING COMPANY, APPELLANT, v. JOHNSON ET AL., RESPONDENTS.

CHATTEL MORTGAGE — Omission of affidavit — Subsequent mortgage. — A failure to comply with the provision of section 1538, fifth division, Compiled Statutes, which requires a chattel mortgage to be accompanied with an affidavit of the parties thereto that such mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, renders such mortgage void as to a subsequent mortgagee, with actual knowledge that the debt attempted to be secured by the prior mortgage was a *bona fide* obligation, as such statute is in derogation of the common law and must be strictly construed. (Cases of *Leopold v. Silverman*, 7 Mont. 266; *Butte Hardware Co. v. Sullivan*, 7 Mont. 307, affirmed.)

Appeal from First Judicial District, Lewis and Clarke County.

The judgment was rendered by HUNT, J.

Cullen, Sanders & Shelton, for Appellant.

The sole controversy in this case is whether a subsequent mortgagee, having actual knowledge of all the facts and circumstances required to be set forth in the affidavit to be attached to a chattel mortgage under our statutes, can take advantage of the fact that the first mortgage is not accompanied by the affidavit required by the statute, and secure priority for his subsequent mortgage over the first. It is a conceded principle of law that as between the parties themselves any mortgage is valid, no matter how defective may be its form.

Under the Statute of Frauds, when the mortgagor remains in possession of the mortgaged property, the mortgage is void as to purchasers and creditors, unless there is an actual change of possession. The Statute of Frauds, however, can be taken advantage of only by subsequent purchasers in good faith; therefore if the defendant Peltier was not a subsequent purchaser *in good faith* he cannot take advantage of the defective affidavit accompanying Johnson's mortgage; and as the Statute of Frauds is the only ground upon which he can rely to defeat appellant's mortgage, he must come within the provisions of this statute in order to derive any advantage therefrom. "A chattel mortgage vests the legal title to the property mortgaged in the mortgagee, subject to be revested in the mortgagor upon the performance of the conditions; and in case of breach of the conditions, the

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d18	583
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122	261
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24	101
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d24	106

title becomes absolute at law in the mortgagee. The title passes whether possession of the chattel mortgaged be delivered or not." (*Hackett v. Manlove*, 14 Cal. 85; *Heyland v. Badger*, 35 Cal. 404; *Berson v. Nunan*, 63 Cal. 550.) Therefore the question arises what evidence of good faith must there be in order to bind subsequent mortgagees. The statute provides that an affidavit of good faith shall be attached to the mortgage; but as we maintain, while this affidavit is *prima facie* evidence of good faith, binding upon subsequent mortgagees, still, if the subsequent mortgagee has actual notice and knowledge of the transaction, he cannot take advantage of the absence of such affidavit to obtain priority for his mortgage over the first mortgage. The statute of New Hampshire is in nearly the same language as the statute of Montana; and in *Gooding v. Riley*, 50 N. H. 400, this doctrine is sustained.

Jones on Chattel Mortgages, section 312, lays down the doctrine: "Notice to a subsequent purchaser or mortgagee, before the completion of the sale or mortgage of an unrecorded mortgage, is conclusive evidence of *mala fides* on his part, so that his title will be subject to the equitable rights of the holder of such unrecorded mortgage." Under this rule it does not matter that the prior mortgage, of which there is actual notice, is defective and voidable, as to *bona fide* purchasers. The notice charges the subsequent purchaser with knowledge of all the facts at that time existing relative to the mortgage, and he stands at best in no better position than his vendor, and cannot avoid the mortgage unless his vendor could. (*Roberts v. Crawford*, 58 N. H. 499; *Sanborn v. Robinson*, 54 N. H. 239; *Allen v. McCalla*, 25 Iowa, 464.) *Tiffany v. Warren*, 37 Barb. 571, is to the same effect; and in New York State the words "in good faith" is made use of after the words "subsequent purchasers," the same as in the statute of Montana. (*Gregory v. Thomas*, 20 Wend. 17; *Sanger v. Eastwood*, 19 Wend. 514. See, also, *Paine v. Mason*, 7 Ohio St. 198; *Day v. Munson*, 14 Ohio St. 488.) In Jones on Chattel Mortgages, section 38, the doctrine is laid down as follows: "A mortgage of chattels without the affidavit required by statute is valid against a subsequent purchaser, with notice that the mortgage was made in good faith, and for a full consideration." It will be observed upon an

examination of all the authorities that the courts have held that a mortgage without the affidavit, or with a defective affidavit, was void as against subsequent purchasers, etc., only go to this extent: That while actual knowledge of the mortgage was not sufficient to uphold the rights of the first mortgagee as against the second mortgagee, it is nowhere laid down; that when a mortgagee, claiming under a second mortgage, has actual knowledge of the good faith, and the full consideration of the first mortgage, he can take advantage of a defective affidavit to give his mortgage priority. The doctrine which we are seeking to establish in this case has been recognized by the courts of equity from the earliest period. (2 Pomeroy's Equity Jurisprudence, § 603.)

Casey & Smith, for Respondents.

It may be added, in addition to the undisputed statement of facts involved in this controversy, that there is no contest on the part of the appellant that the respondent, Robert Peltier, advanced the consideration of his mortgage from Johnson, and received this mortgage upon a valid, subsisting, and valuable consideration, relying, in the advancement of his money, upon the assured defective execution of the chattel mortgage of Johnson to the appellant. It is conceded that the mortgage from D. M. Johnson to Robert Peltier was properly executed and delivered, and moreover it is apparent that Robert Peltier was in possession of the mortgaged property by transfer from D. M. Johnson, and claiming an adverse possession predicated on his mortgage from Johnson, at the time of the commencement of this suit. When Robert Peltier examined the filings of the recorder and found no affidavit attached to the mortgage of appellant, he had a right to believe no affidavit could be made, at least it was not for him to speculate on its absence and reasons therefor. The statute makes no exceptions as to any one except the parties. The knowledge of Peltier of the existence of the first mortgage is a futile pretension for the defeat of his rights under his mortgage. (Jones on Chattel Mortgages, par. 314; *Bingham v. Jordan*, 1 Allen, 373; 79 Am. Dec. 748; *Travis v. Bishop*, 13 Met. 304; *Gassner v. Patterson*, 23 Cal. 299; *Sheldon v. Conner*, 48 Me. 584; *Rich v. Roberts*, 48 Me. 548; *Bevans v. Bolton*, 31

Mo. 437; *Pryson v. Penix*, 18 Mo. 13.) As to good faith in fact and in law see Jones on Chattel Mortgages, par. 315. The appellant asks the court at the end of its brief to sit in suppressive judgment on the wisdom of the legislature, to declare its requirements useless, and abolish the safeguards of an affidavit of good faith, which seems the only possible corrective against fraud in such transactions.

HARWOOD, J.—The sole question involved in this appeal will appear by a brief statement of facts: The defendant Johnson was indebted to the plaintiff, Milburn Manufacturing Company, in the sum of eleven hundred dollars, to secure the payment of which Johnson executed a mortgage upon a certain chattel; but the mortgage failed to conform to the requirements of the statute, in that the possession of the mortgaged chattel remained with the mortgagor, Johnson, according to a provision in the mortgage to that effect, and the mortgage was not “accompanied by an affidavit of all the parties thereto,” either personally or by agent, “that the same was made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor.” (Comp. Stats. div. 5, § 1538, p. 1068.)

The defendant, Robert Peltier, also became a *bona fide* creditor of Johnson; and, knowing of Johnson’s *bona fide* indebtedness to Milburn Manufacturing Company, and of said defective mortgage to that company, Peltier obtained to himself a valid mortgage on the same chattel to secure his demand, conforming to all the statutory requirements, and filed the same of record second in point of time to the first-mentioned mortgage.

On default of payment of said debt to Robert Peltier, he got possession of said chattel, and was about to apply the same, under the conditions of his mortgage, to the satisfaction of the debt owing to him, when the plaintiff, Milburn Manufacturing Company, brought this action to foreclose its mortgage, and recover possession of said chattel from Peltier. The trial court rendered judgment in favor of Peltier, and plaintiff appeals.

The question here involved is whether said first mortgage to Milburn Manufacturing Company is void as against Peltier, a subsequent mortgagee, by reason of the failure to accompany

the first mortgage with the required affidavit, when the subsequent mortgagee had notice or knowledge of the *bona fide* character of the first debt.

The learned counsel for appellant appeals to authorities which treat generally of equitable rights, and obligations arising by virtue of actual notice, to maintain the negative of the above question. But we do not think the doctrine can apply so as to control the question at issue.

The statute provides that "no mortgage of goods, chattels, or personal property shall be valid, as against the rights and interests of any other person than the parties thereto, unless the possession of such goods, chattels, or personal property be delivered to and retained by the mortgagee, or the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent, an affidavit of those present, and of the agent or attorney of such absent party, that that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, and be acknowledged and filed as hereinafter provided."

This statute, providing a method by which a creditor may acquire a special lien on the debtor's personal property while the possession remains with the debtor, is in derogation of the common law, and it must be strictly construed, under a well-established rule of construction. The same is the doctrine declared in *Leopold v. Silverman*, 7 Mont. 266; *Butte Hardware Co. v. Sullivan*, 7 Mont. 307.

All *bona fide* creditors stand on an equality before the law in respect to enforcing payment of debts, unless this equality is varied by a provision of law giving a special lien, or enabling one to acquire a special lien by complying with the provisions of law. If one attempting to create a special lien in his favor, or to take advantage of one provided by law, fails to comply with the provisions of the law governing, then such creditor falls back into the common line occupied by other general creditors, and cannot invoke the rules or doctrine of equity to avoid this result. Such is the case with mechanics' liens, for example. Suppose one mechanic or material man, knowing fully of the

bona fide character of his predecessor's claim, perfects a lien which he asserts as against one filed by his predecessor after limitation had run, or without verification, or otherwise failing to comply with the statute. Is the latter, because he had knowledge of the good faith of his predecessor's claim, estopped from contesting his lien? The debtor himself could object to the lien for failure to comply with the statute provided for it, and who would know better of the *bona fide* character of the obligation?

It is an arbitrary provision of law which enables one creditor, in preference to another, to take and hold a special lien on the personal property of his debtor, leaving the possession with the debtor; and that law demands a compliance with its terms. The first declaration of the statute in reference to chattel mortgages is that "no mortgage of goods, chattels, or personal property shall be valid, as against the rights and interests of any other person than the parties thereto, unless," etc. We regard this requirement of an affidavit of, or on behalf of, all the parties to a chattel mortgage as a condition going to the validity of the mortgage, which the law demands, independent of the question as to notice or knowledge of any person other than the parties, that the debt intended to be secured was in fact a *bona fide* obligation.

In the cases of *Leopold v. Silverman*, 7 Mont. 266; *Butte Hardware Co. v. Sullivan*, 7 Mont. 307, and *Baker v. Power*, 7 Mont. 326, it has been decided by this court that the failure to comply with the provisions of the statute in making the required affidavit is fatal to the mortgage. The only distinction between those cases and the one at bar is that in the latter case there was actual knowledge on the part of the second mortgagee that the debt attempted to be secured by the first was a *bona fide* obligation. We hold that such knowledge would not change the rule laid down in those cases. (*Hanes v. Tiffany*, 25 Ohio St. 549; *Belknap v. Wendell*, 31 N. H. 92; *Parker v. Morrison*, 46 N. H. 280; Jones on Chattel Mortgages, § 36.)

Judgment affirmed.

BLAKE, C. J., and DE WITT, J., concur.

KING, APPELLANT, v. AMY AND SILVERSMITH CONSOLIDATED MINING COMPANY, RESPONDENT.

MINES AND MINERAL LAND—Statutory construction—Extent of location defined where vein crosses a side line.—Section 2322, Revised Statutes of the United States, provides in substance that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the apex of which lies within the vertical planes of the lines of the surface location, although such veins in their inclination on their course downward cross the vertical plane of a side line; *provided*, that such exterior parts lie within the projected planes of the end lines. *Held*, that where a vein crosses the side line of a location the strike is terminated by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane, parallel to the end lines, drawn downward, and which takes effect at the point where the apex intersects the side line.

Appeal from Second Judicial District, Silver Bow County.

The cause was tried before DE WOLFE, J., without a jury.

Statement of the facts, prepared by the judge who delivered the opinion.

The plaintiff is the owner of the undivided three fourths of the Non-Consolidated Mining Claim. The defendant is the owner of the other undivided fourth. The defendant is the owner of the Amy Claim. The northerly side line of the Amy is the southerly side line of the Non-Consolidated. The west end line of the Amy is 491 feet long, and runs south, 30 deg. west. The east end line is the same length and course. The north side line is 1,470 feet in length, and runs south, 66 deg. 30 min. west. The south side line is the same length and course. The vein of the Amy Claim, on its onward course or strike, passes through the north side line, and the apex thereof crosses said side line at a point 184 feet easterly from the west end line, and passes into the Non-Consolidated ground. Said vein runs on northwesterly, and does not again enter the Amy ground. The apex of the Amy vein passes out of the south side line of the location, at a point between the southeast corner of the Amy and a point 600 feet westerly therefrom. The dip of the vein is to the north. Four hundred and eleven feet of the north line of the Amy, commencing at a point 17 feet east of the northwest corner, forms the south line of the Non-Consolidated. The west end line of the Non-Consolidated is 181 feet in length,

9	543
11	388

9	543
17	111
17	128

9	543
25	147
25	148

9	543
137	150

and runs south, 1 deg. 40 min. west. The east end line is 10 feet long, and the same course. The north side line is 372 feet long, and runs north, 88 deg. 55 min. west. Each claim was located and patented subsequent to the passage of the United States Mineral Land Act of May 10, 1872, and the amendments thereto, and is subject to the provisions of those laws.

The plat on page 423 (Fig. 1) indicates the surface lines of the two claims, and the direction of the strike of the vein.

The plaintiff's action is for partition and accounting against the defendant, alleging that defendant has taken large quantities of ore from subterranean workings at a point north of the Amy north side line, which is the Non-Consolidated south side line. The only controversy is as to where the vertical end line bounding plane should be drawn downward as a limit of the mining operations of the defendant. Plaintiff contends that the Amy north side line should be considered the end line of that claim for all purposes, and that through that side line the vertical plane should be drawn downward perpendicularly, beyond which, to the north, the Amy company cannot follow the vein on its strike or dip. The defendant's position is that the vertical bounding plane, limiting its rights, must be drawn downward at the point where the Amy apex crosses the north side line of the claim; such plane to be parallel to the planes of the end lines as located by the Amy. On the trial the court took a view at variance with those of both plaintiff and defendant, and held that the bounding plane must be placed at the point where the apex crosses the north side line of the Amy; but that such plane must be drawn downward at a right angle to the strike of the vein at that point. The plat (Fig. 1) indicates the positions of the three planes described. They intersect at a common point (*e*, on the plat), viz., the point of departure of the apex from the Amy exterior boundaries. Judgment was entered in accordance with the views of the District Court. The plaintiff appeals. The case comes before this court as a triangular contest. Since the decision below, the learned judge who tried the case appears as counsel for the respondent, and urges the theory for the respondent, which the court below adopted. Co-counsel for respondent presents the theory which he held below. Appellant's position is as it was in the District

Court. For convenience in terms we will designate these theories as follows: (1) The doctrine adopted by the court below will be called the court's theory and line and plane; (2) that contended for by the appellant, the plaintiff below, the appellant's; (3) that urged by the respondent, the defendant below, and presented by one of its counsel here, as the respondent's. The point where the ore was taken out by the defendant is north of the appellant's plane, and east of each of the two other planes. Whether the court's or respondent's view is adopted is practically immaterial to the respondent, but the principles involved are vitally at variance. A decision as to which theory of the plane is the law in the case is the whole and only controversy. That decision will settle the title to the portion of the vein from which the ore was taken.

E. W. Toole, and William Scallon, for Appellant.

The court expressly found that the vein in question runs out of *both the side lines* of the Amy Claim. The Amy location was therefore made crosswise of the vein so that its so-called side lines instead of its nominal end lines cross the vein at the surface. In such a case it is settled by the decisions of the Supreme Court of the United States that the so-called side lines are the real end lines of the claim, and that the respondent cannot go beyond them, even if the apex of the vein be inside of the Amy lines.

In *Mining Co. v. Tarbet*, 98 U. S. 463 (*The Flagstaff Case*), it is decided in so many words that the end lines of a claim properly so called "are those which are crosswise of the general course of the vein on the surface." And the court say (pp. 467, 468): "We think that the intent of both statutes [1866 and 1872] is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex at or near the surface. . . . If he has located

crosswise of the lode and his claim is only 100 feet wide, that 100 feet is all he has a right to." [The italics are ours.] The Amy is only 491 feet wide, but the judgment seeks to give it 800 feet along the vein in opposition to the ruling just cited. This decision has been affirmed in *Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 196, and in *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478. In the *Iron Silver v. Elgin Case* it is also settled that the lines *as surveyed* must govern, and that no judicial adjustment of lines can be allowed. It will be noticed that the court in the case at bar really adopts the minority view set forth in the *dissenting* opinion of the late Chief Justice Waite in the *Iron Silver v. Elgin Case*. The Chief Justice says that in his opinion "the end lines of a mining location are to be projected parallel to each other and crosswise of the general course of the vein within the limits of the location. . . . The end lines are not necessarily those marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface." The majority of the court held, on the contrary, that "the boundary planes should be definitely determined by the lines of the surface location," and that "if the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences."

The *Argentine Case* is very closely analogous to the present one. The plaintiff in error in that case, defendant below, was in a position exactly similar to that of the respondent here. It will be seen by reference to the brief of the plaintiff in error, page 482 of the report, that there it set up the very same claim as the respondent does now. Says the plaintiff in his brief: "The premises in controversy were outside of the side lines, and within vertical planes drawn through the end lines of the Pine and Camp Bird lodes, and *just within* the *side line* of the *Adelaide*. [The Adelaide was the claim owned by plaintiff below corresponding to the Non-Consolidated.] Now it was in reference to these workings and these premises at this point that the court was asked to charge *that if they found the apex of this vein within the surface lines of the Argentine Claim* (which included the Pine and Camp Bird claims) *their verdict* should be for the *defendant*. The court not only refused so to charge, but it utterly

ignored all claim of the defendant on this ground. . . . This was error." [Italics ours.] This was the only error alleged. Here was a case where the owner of the apex was attempting to follow the vein on its dip beneath the points of the apex so owned, although the vein ran out of the side line. Precisely the case at bar. The court, in deciding the case, quote from *Mining Co. v. Tarbett (The Flagstaff Case)*, the statement, among others, that the end lines of the claim properly so called are "those which are crosswise of the general course of the vein on the surface," and say (p. 486): "Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, *even if its apex or outcropping is within its surface boundaries*, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them." [Italics ours.] In accordance with the rules thus laid down by the Supreme Court, we claim that "the line which separates the location of the plaintiff below from the location of the defendant is an end line," and that, although the apex of the Amy vein may be within the surface lines of the Amy Claim, the defendant cannot go beyond the vertical plane of said common boundary line.

We therefore respectfully submit that the decree should be modified so as to declare that all those portions of the vein in controversy which lie within the vertical plane of the southern boundary line of the Non-Consolidated Claim and its other boundaries are a part of the Non-Consolidated, and that this claim should be advertised and sold as including such portions.

W. W. Dixon, and *Knowles & Forbis*, of counsel, for Respondent.

As stated in appellant's brief, the only question for decision in this case is the construction of the mining law, with reference to the rights of adjoining claimants, in cases where the vein or lode in its strike or course crosses the side instead of the end line of the claim. The plaintiff contends that in such case the side line becomes an end line absolutely for all purposes beyond

which the claimant cannot go on the dip of his ledge, although in its downward course the ledge may so far depart from a perpendicular as to enter the ground of the adjoining claimant. The position of the defendant and respondent is that the side line in such cases becomes an end line for the purpose of cutting off the vein or lode in its strike or onward course, but not in its dip or incline. That if the ledge dips in its downward course from the ground in which its apex is situated, the owner of the claim in which the apex is found may follow the dip of the ledge to any depth whatever, and although by so doing he may enter upon the ground of another. This right to follow, the respondent maintains, is confined to the length of the vein as shown by the apex within the ground of the claimant, and in following such dip the owner must confine himself within a line drawn parallel to the end lines of the claim, at the point of the intersection of the side line with the apex of the vein. Upon the trial of the case, the court took a view of the law at variance with the positions of both the plaintiff and defendant. While holding that the owner of the apex might follow the dip of the vein beyond his or its side line, and into the ground of the plaintiff, the court held that such dip or incline must be followed within a line drawn at right angles to the strike of the vein at the point of its crossing the side line. The position taken by the court, and the position assumed by the defendant, in so far as this case is concerned, in their practical effects are the same. This arises from the fact that the end lines of the Amy Claim are almost parallel to a line drawn at right angles with the strike of the vein in controversy, and as a consequence the effect of the decision as it now stands leaves but little difference between the line as insisted upon by the defendant and as defined by the court. However, the defendant believes there is a great difference in principle between its position and the decision of the court.

The only decisions bearing upon the question, so far as we have been able to ascertain, are those cited by the appellant in his brief, all of them being the decisions of the Supreme Court of the United States. The first of these decisions in order is the case of *Flagstaff S. Min. Co. v. Tarbet*, 98 U. S. 463. In this case it was attempted to invoke the doctrine that had prevailed before the enactment of a mining law by Congress.

Therefore it had been held that one having a location upon a claim could follow the strike of the vein in whatever direction it might run. The location was the vein and nothing else, and if the locator was mistaken in its course, he might, nevertheless, follow the vein for the full number of feet which he was entitled to, and did locate. Under a location made under the law of 1866 it was contended that this still might be done, and if the vein in its onward course departed through the side lines, the locator of the claim might follow it on its course to the full extent of the vein which he had located, or attempted to locate. This the Supreme Court says he may not do; that the ground located fixes the extent of his right to the vein; whatever extent of vein might be included therein, that he had a right to, but he could not go beyond his side lines in following the vein on its strike. To the extent that this decision goes in the determination of the question in controversy, it corresponds exactly to the position taken and maintained by the respondent.

The next case cited by the appellant is the case of *Iron Silver Min. Co. v. Elgin Min. & S. Co.* 118 U. S. 196. This is the case popularly known as the *Horse Shoe Case*. We think the decision in this case turned altogether upon the form of the claim, and that the question arising in this case was not considered and did not arise in that. The court held that on account of the peculiar form of the claim, no end lines had ever been established, and that if the so-called end lines were extended in their own course they would not include the ground in controversy in that action. In the course of the opinion the court says: "We are, therefore, of opinion that the objection that, by reason of the surface form of the Stone Claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof. Besides, if the lines marked as end lines on the plat of that claim can be regarded as such lines of the location, no part of the Gilt Edge Claim falls within vertical planes drawn down through those lines continued in their own direction." The decision is not as clear as might be desired upon the point of controversy in this case, but we think the lack of clearness arises from the fact that the particular point therein raised was not discussed, and that the case was decided, not upon the question here in issue, but

upon the fact of the peculiar form of the Stone Claim. That the rule laid down in the *Flagstaff Case*, 98 U. S. 463, was not considered as applying to the *Horse Shoe Case*, is shown by the fact that Justice Bradley, who delivered the opinion in the *Flagstaff Case*, concurred with Chief Justice Waite in his dissenting opinion in the *Horse Shoe Case*.

The other case cited by the appellant is *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478. For a better understanding of the facts of the case, and to show really what was in controversy, we call the attention of the court to the decision of Justice Hallett, in the lower court, and from which the writ of error was sued out. This is reported as *Van Zandt v. Argentine Min. Co.* 8 Fed. Rep. 725. It appears from the reading of the two decisions that the apex of the lode in controversy ran practically at right angles with the side lines of the Camp Bird and Pine locations, under which the defendants claimed. Under these circumstances if the end lines of the claims, which were nearly parallel with the course of the vein, had been projected at the points of intersection, as we insist must be done in such cases, there would have been but little if any ground lying between them in which the dip of the vein could have been followed. But the defendants in that case insisted that they might follow the vein in its dip or downward course, not *between* these lines, but *across* them. The decision of the court seems to be that the side lines became end lines for the purpose of cutting off the strike of the vein, and that the defendant could not follow across those lines, for the reason that the ground in controversy was not between the end lines extended in their own direction, and projected at the points of intersection of the side lines with the course of the vein. The further facts of the case, as appears from the reports, are that the Adelaide location, under which the plaintiff claimed, was the older location of the two or three claims; that it was made upon the dip of the lode, upon which the location of the Camp Bird and Pine claims were located; that the ground in controversy was within the limits of the Adelaide location, and that the same belonged to the Adelaide location by reason of its prior location, and that the defendants were attempting to take ores from the vein of the Adelaide location across its side line. An examination of the case as

reported in the lower court will show that the question decided by the United States Supreme Court on appeal was really not raised or considered below, and the brief of counsel in the United States Supreme Court shows the same thing. The main question below was whether a location on the apex of the vein was superior to a prior location in the dip. In this case, as in all others decided by the Supreme Court, the question has turned upon the particular facts of the case, and nowhere has the question arisen in a case similar to the one now before the court, and we contend that none of the cases cited apply to the facts of a case like that of the case at bar. Aside from all decisions the reason and purpose of the law seems clear, at least to us. The intention being to give to every locator all the veins, the tops or apices of which are within his location. He may follow such veins in their strike, so long as he does not depart from his surface ground, but no further, whether the strike be determined by the side or end, or other line of the claim. He may follow all such veins in their dip or downward course wherever they may extend, with the one condition that they must not depart from within planes drawn downward through his end lines, or if the vein passes through the side lines, then between planes drawn downward at the point of departure, parallel to the end lines. The requirements of the law that these end lines should be made parallel show what its purpose was. Unless it was the intention to establish a plane along which the dip of the lode must be followed, there was no necessity for making the end lines parallel. By following parallel end lines there can be no divergence or contraction of the lines within which the dip is to be followed. Nor in our opinion are these end lines to be fixed and immovable, but they may be projected to suit any vein that may be found within the limits of the claim. If the vein departs through the end line, then the end line becomes the plane upon which its dip must be followed. If the vein departs from the side line, then the end line is to be projected at that point of departure, and followed upon and along the same plane as if it had departed from the end line. The establishment of the end line is the establishment of a plane, and its parallelism has no other purpose than to establish a plane or system of planes, along which the dip of all lodes within the claim must be followed.

The fact that all of the decisions cited quote so freely from *Mining Co. v. Tarbet*, and the effect of that decision is indisputable, shows what was in the minds of the judges in the decision of the other cases, and that is simply this, that the side line becomes the end line for the purpose of cutting off the strike, and for no other purpose, and that the right to follow the dip must always be determined by the parallel end lines. The rule contended for by appellant would in practice operate very hardly. It is difficult to fix accurately the course of a vein at the time of location. And yet, on appellant's theory, the slightest divergence at one or both side lines would cut off the locator's right to follow the vein on the dip at any point beyond his vertical side lines, and there he might lose the most valuable part of his location. This seems directly contrary to the act of Congress, which gives the locator all veins, the top or apex of which is included within the lines of his location, and the right to follow such veins on their dip within defined planes. The idea of this act seems to be that the locator has a right to follow the dip to the extent that he has the apex within his lines. But on appellant's theory the locator might have 1,499 feet in length on the apex of a vein, but no right to dip beyond his vertical side lines. The rule claimed by respondent here seems to conform to all the requirements of the act of Congress, and to secure the locator in all the rights that act gives him.

S. De Wolfe, of counsel, for Respondent.

The sole question presented on this appeal is the one stated in the appellant's brief, as to whether the owner of a quartz lode claim has the right to follow a vein or lode on its dip or downward course when the vein on its strike or course crosses the side line of the surface location. And this involves the true meaning and construction of section 2322 of the Revised Statutes of the United States. In the trial court, as here, the appellant maintained that the true construction of this section, as well as the adjudications thereon, confined the right to follow a vein or lode on its dip or downward course, and was limited to such veins or lodes as in their strike or course departed through the end lines of the location, and did not apply to veins which crossed

the surface side lines; that, as to such veins, the side lines of the location became the end lines of the vein, beyond which the owner or locator had no right to follow the vein on its dip or downward course. The respondent, on the other hand, contended that the right of the owner to follow a vein on its dip or downward course was the same whether it crossed the end lines or side lines of the surface location, but maintained that the right must be confined to such portion of the vein or lode as lie between lines drawn parallel to the end lines on the surface and crossing the vein where it departs through the surface side lines. The judge before whom the trial was had took a different view of the law from either of these, and held that lines drawn at right angles through the vein or lode where it crossed the side lines, and these lines extended in the direction of the dip of the vein until it intersected a vertical plane drawn downward through the end lines of the location, and continued in the same direction to the place of intersection, constituted the true dip of the vein, and the part which the locator was entitled to follow in its downward course.

The object of the present brief is to sustain the construction of the law given by the court. Practically it may not be of importance in the present case whether the court sustains this view, or the theory maintained by my co-counsel for respondent. But the question is an interesting one, and may be of vital importance in other cases. The question for decision is this: What is meant by the dip or downward course of a vein as used in the section of the mining law cited? The law entitles the locator to all veins, the top or apex of which lies within the surface lines of the location extended downward vertically, with the right to follow such veins on their dip or downward course, although they may so far depart from the perpendicular as to extend outside the vertical side lines of the surface location. Nothing whatever is said in the law about projecting end lines parallel to the end lines of the surface location, and crossing the vein at the point at which it departs through the surface side line. Such lines are arbitrary in themselves and involve a legal as well as mathematical absurdity. In theory, the dip or downward course of a vein must of necessity be at right angles with its strike or course at the surface. This may not be always true, for experi-

ence has shown that veins change in their dip, but whatever the dip the locator or owner has the right to follow it in its downward course, and the right to the vein on the dip corresponds in length to the apex of the vein where it comes to, or nearest the surface. If the theory claimed by the leading counsel for respondent of projecting lines drawn parallel to the end lines of the location be correct, the right of the locator would vary with the varying angles at which the vein crossed the surface location. If it was at right angles, the side lines of the location would then be the end lines on the lode, as was held in the case of *Flagstaff Min. Co. v. Tarbet*, 98 U. S. 463. Under this theory of projecting lines through the vein parallel to the end lines of the location, it follows as a mathematical fact that whenever the distance between lines so drawn is less than the length of the lode on its strike or course, the locator or owner gets less of his lode on its dip or downward course than he has on the surface or strike, and further, that his right on the dip of the vein will vary with every angle at which his vein crosses the surface location. Whereas, by drawing lines at right angles with the strike of the vein at the points through which it departs from the surface side lines, the owner acquires a section of the vein on its dip or downward course exactly corresponding with the length of the vein on the surface. This right to follow the dip of the vein is limited by the law to vertical planes drawn downward through the end lines of the location, and so continued in their own direction until they intersect such exterior parts of such veins or ledges.

Counsel for the appellant in his brief on file does not discuss the section of the law referred to, but relies on three decisions of the Supreme Court of the United States as upholding the doctrine that when a vein or lode crosses the side lines of the location, such side lines become the end lines on the vein so crossing, and the owner has no right to follow the vein on its dip or downward course beyond these side lines. The three cases relied upon as sustaining this proposition are, *Flagstaff Min. Co. v. Tarbet*, 98 U. S. 463; *Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 196; *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 178. In the case of the *Flagstaff Min. Co. v. Tarbet*, 98 U. S. 463, the facts were that the Flagstaff Mine, as located and patented, was nearly at right angles with the Titus Claim owned

by Tarbet. The Flagstaff Company in its workings drifted some 300 feet east of the east boundary line of the Flagstaff Claim, and took out a quantity of ore claimed by Tarbet as belonging to him as the owner of the Titus Mine. (See statement of the case on p. 464.) As the Flagstaff Mine was located under the Act of 1866, which required the discoverer of a vein or lode to locate the lode only, without locating with it any surface ground, the contention of that company was, that having discovered and located the vein, it had the right to follow the vein wherever it extended, and without reference to its patented surface ground. According to the theory claimed by that company, having located a vein 2,600 feet in length, they had the right to follow the vein that distance without reference to the strike or course of the vein. Upon these facts the court decided that the Flagstaff location having been made crosswise the lode, the side lines of the location became the end lines upon the lode, and consequently the Flagstaff Company were not entitled to the ore taken from the point in controversy. There was no question raised, or that possibly could be raised, in the case as to the dip or downward course of the vein from the Flagstaff Mine into the Titus Mine from which the ore was taken. The ore was taken out 300 feet from the east boundary line of the Flagstaff, and hence could not have been upon the dip of the vein from the Flagstaff. The case and the facts in the case have no analogy whatever to the case at bar. It cannot, therefore, be an authority under the rule of construction laid down by the Supreme Court. The facts of the case of the *Iron Silver Min. Co. v. Elgin Min. Co.* were also essentially unlike those of the case at bar. The language used by Justice Field in that opinion clearly refutes the position assumed by the appellant that the side lines become the end lines upon the lode for all purposes when the lode in its strike or course passes through the side. It is the boundary of the lode on the surface, but not on its dip, otherwise the language of the court is meaningless when it says: "Except when in its descent the vein passes outside of them (the surface lines) and the outside portions are to lie between vertical planes drawn downward through the end lines." The language also refutes the theory of my co-counsel

for respondent in projecting new end lines for a vein crossing the location through the surface side lines. Vertical planes drawn downward through the end lines of the surface location, and continued in their own direction until they intersect such exterior parts of the vein, constitute the boundary within which the owner has the right to follow the vein on its dip, and not projected lines drawn parallel to such end lines through the vein when it crosses the side lines.

This, like the *Flagstaff Case*, it is urged, is not an authority in point. The last case relied upon by the appellant is that of *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478. From the statement of facts in this case it appears that the Adelaide Claim, owned by the plaintiff, was located northeast and southwest, and that the claim owned by the defendant crossed the Adelaide location obliquely, being located north and south. The Adelaide was the earliest location, and the vein was discovered on its dip and not on its apex. The statement of the case being not altogether clear, but from the facts recited, the dispute seemed to arise over the question as to the sufficiency or validity of the Adelaide location, it being made on the dip and not on the apex of the vein. The court held such a location good, and affirmed the judgment of the lower court. The facts of the case, as well as the principle of law applicable, were wholly unlike the case at bar, and like the other two cases relied upon, seem not to be an authority for the principle claimed by appellant. The court in this very opinion quotes with approval the language of the same court in the case of *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, in which the court says: "It was conceded by all parties and the court, that the party having the apex had the right to go outside of his side lines and follow the vein." Said Mr. Justice Miller in that case, speaking for the court: "It is obvious that the vein, lode, or ledge, of which the locator may have 'the exclusive right of possession and enjoyment,' is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside the vertical lines of the surface location." Language more apt and pertinent to the case at bar could not be used. It fits exactly the principle for which I contend.

The case of the *Iron Silver Min. Co. v. Cheesman*, both in its facts, and in the application of the law to the facts, has a much closer resemblance to the case at bar than the decisions cited by appellant. In this case the court uses the following exact language: "It seems to have been conceded throughout the long trials in the case, that if plaintiff could establish the sufficiency and continuity of his Lime lode so as to make the defendants' Smuggler lode identical with it, he was entitled to recover; and on the other hand, if he did not do this he had no right to the Smuggler lode, which was in that case a different lode, outside of the vertical extension of plaintiff's side lines." (P. 531.) Nothing whatever is said in the argument of counsel on either side, or in the opinion of the court, as to the right of a locator to follow his vein on the dip or downward course, whether it crossed the end or the side lines of the location. We think, therefore, that upon authority, as well as upon the rightful construction of section 2322 of the Mining Statute, that the locator or claimant of a lode claim has the right to follow his vein or veins on their dip or incline, to the extent and length that he has the top or apex on the surface, and without regard to whether such vein or veins depart through the end or side lines of his location, and that his right can be accurately measured only by lines drawn at right angles through the vein where it crosses the side lines of the location, and continued thence in the direction of the pitch of the vein.

Appellant's brief in reply.

The primary question for decision is not "what is meant by the dip or downward course of a vein," as claimed by S. De Wolfe, Esq., because appellant's contention would cut respondent out of following at all the dip, or so-called dip of the vein. True, if appellant's claim did not obtain, then, as between the two propositions advanced as law on the part of the respondent, the question as to what is meant by the dip of the vein, viz., whether the true dip at right angles to the strike, or a course going down at an angle within the end lines extended, would become important as an argument or reason. The points made in Mr. De Wolfe's brief against the proposition advanced in the brief

of other counsel for respondent, to the effect that the lines proposed by his co-counsel are arbitrary in themselves, and involve "a legal as well as a mathematical absurdity"; and that if such theory should obtain, the right of the locator would vary with the varying angles at which the vein crossed the surface location; and that, according to the angle, the locator or owner might get less of his lode on its dip or downward course than he has on the surface or strike; and that his right on the dip of the vein would vary at every angle with which his vein crossed the surface location (points which we do not dispute), *apply with equal or greater force to counsel's own proposition.*

First—The course of the apex of a vein is frequently very irregular, and, in many cases, as was found to be a fact in the *Flagstaff Case*, different from the true strike or course of the vein itself, as determined by drifts. The true strike itself is seldom a straight line, and in most cases is subject to many and great variations. Lines drawn in accordance with the decision below would vary accordingly, whether the course of the apex or the true strike were taken as a base. The court in the present case drew a line at right angles with the local strike of the vein at the point where it crosses the north side line of the Amy. The exact point of departure on the south side line is not determined, but when it is, it may quite possibly be ascertained that the strike of the vein at the latter point, as well as the course of the apex, are entirely different from the strike and course on the north side; in such event the court must either (1) draw boundaries not parallel, or (2) lines of which one at least cannot be at right angles to the strike of the vein or the course of its apex. In the first case the express rules laid down in the *Iron Silver v. Elgin Case* will be violated; and in the other the principle adopted in the court below, and here contended for, will have to be disregarded. The difficulty would not be removed by adopting the general or average course of the vein, for that could only be determined by very extensive explorations, and it would also vary according as the average was taken within one claim only, or upon the whole length of the vein as far as known or developed. Again, it was held in the *Flagstaff* and the *Iron Silver v. Elgin Cases*, that the locator's rights must be decided according to the course of the apex, and not from the true dip

of the vein, which, the court say, may not be determined, perhaps, without considerable under-ground development.

Second—That such lines are arbitrary, is equally true of the court line in the sense that it is a line judicially established: in many cases incapable of exact determination, except by adopting an arbitrary line, and often absolutely impossible to determine if more than a single point on the vein be looked at. Besides, it is clearly in conflict, it seems to us, with the *Iron Silver v. Elgin*, which absolutely prohibits the drawing of arbitrary or judicial lines, and the judicial rectification of end lines; and requires that a locator's rights be determined from the actual surface lines as surveyed.

Third—The other point, viz., that the owner may get less of his lode on its dip, etc., will be shown to militate against the ruling of the court below in its application to the case at bar. For, while the court below allows the respondent to follow the vein out of its side lines on its dip, between lines drawn at right angles to the course of the vein where it crosses the side line, it also expressly holds that such right is cut off the moment the vein is intersected by the vertical plane of the surveyed end line. It will be seen at a glance that this cuts down the locator's right on the dip to a triangular space; and so the owner does not acquire "a section of the vein on its dip or downward course exactly corresponding with the length of the vein on the surface."

Iron Silver Co v. Cheesman, 116 U. S. 529, is quoted by Mr. De Wolfe. The question as to the effect of a location crosswise of the vein was not discussed at all, the only question at issue being that of the continuity and identity of a certain vein; and the only question of law arising in it being the proper definition of what constitutes a vein, and a continuous vein. How that case, wherein the question was not involved at all, can be in point, or even cited, when it is claimed that the cases relied upon by appellant are not relevant on account of an alleged dissimilarity in the facts, we fail to see.

All counsel claim that the cases relied on by appellant are not in point on account of an alleged dissimilarity in the facts. But let us look at the *reason* of these decisions, since it is said that the *reason of the law is the law itself*. For as Bishop says, "though a court may find no case from the facts of which to

decide a particular question, and in this sense the question is new, if it finds a principle within which the case falls, it will proceed thereon with the same confidence as though there were thousands of decisions." (Bishop on Contracts, § 14.) We find that in the *Flagstaff* and *Iron Silver Cases*, the parties were debarred from going out of their side line, in the one case on the strike and dip of the vein, and in the other on its dip. But for what reason? Because it was held in both these cases that the end of a claim, properly so called, is that which crosses the apex on the surface, whether such line be called by the surveyor or owner an end line or a side line. True, in the first case the dip question was only one of those discussed, but the conditions and limitations of the right to the dip are distinctly stated as quoted in our first brief; true, again, in the second case the vein dipped away from and not through the lines crossing the apex on the surface. But in each case the rule is given by which the end line is determined. So the application of the *Flagstaff* and *Iron Silver* decisions to a case like the present one becomes a matter of reasoning and of logic; and if the reason of the law or rule applies, the law or rule itself applies. Now, what is the end of a claim if not a line which bounds the right of a claim owner on a vein, and the vertical plane of which, extended downward, cuts off his right to follow the vein, either on its dip or on its strike.

Argentine Min. Co. v. Terrible Min. Co. similar to case at bar. In this case, despite anything claimed by any of the counsel for respondent, both the facts and the law are absolutely similar, with the exception of the fact that the Adelaide Claim (corresponding to our Non-Consolidated), was the prior location; a fact, however, which cut no figure whatever in the decision, and of a difference in degree of the angle of departure; that is to say, in the case at bar the angle between the course of the side line, and that of the average strike of the vein (which counsel agreed upon so as to have a decree entered, although the court itself did not find it), is 144 degrees. In the Argentine it is 100 degrees. Or, if we take the angle made by the course or direction of the dip and the side line, we have in the one case an angle of 54 degrees, and in the other case an angle of 10 degrees, and that is the only difference: truly, one of degree only. The vein passes out of

the side line of the Pine Claim both on its strike and on its dip; and the question arose as to the ownership of those portions of the dip, of which the apex was inside of the Pine Claim: and here we find the rules and principles of the first two cases applied, and the court says that this line, although located and surveyed as a side line, was an end line, "across which as they (it) are extended downward vertically, defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries." So here, upon reason, and principle, and authority, we have it laid down that a real end line, though surveyed for a side line, is an end line for all purposes, and not a hybrid thing; an end line at one point for one purpose, and a side line at another point for another purpose. We note particularly, that we fail to find in the opinion in the *Argentine Case* any quotations from or references to the *Iron and Silver v. Cheesman*, as claimed in Counselor De Wolfe's brief, such reference being only in the brief of counsel for plaintiff in error. Both counsel for respondent further seem to claim, in effect, if not in so many words, that an express and decisive ruling, made by the Supreme Court of the United States, is not to be regarded as binding and conclusive, because, forsooth, the case perhaps 'might have been determined upon some other point.

We fancy that, since the Supreme Court thought proper to make an express ruling upon a question before it, even though it might have been contented to rest its decision upon some other point, to all lower courts, at least, such ruling must be binding. But let us see. In *Iron Silver v. Elgin* it was expressly ruled, in the face of a dissent, that the real end lines of a claim are *those which cross the vein on the surface*; that such lines must be parallel, and *no judicial reconstruction, establishment, or projection of end lines can be made*. Nearly five pages of the decision are devoted to the discussion of this point. In four lines the court dispose of another point, perhaps conclusive by itself, and referred to in Counselor De Wolfe's brief, viz., that even the nominal end line did not include the ground in controversy. The Argentine decision is said to be not binding, because, forsooth, in the court below, there was a question raised as to the validity of a location on the dip; the claim being, as we presume, that this point in the decision is a mere *obiter dictum*. The question, however,

was expressly raised in the court below, in the most explicit manner, viz., by the defendant asking an instruction to the effect that the position of the apex gave them the dip under the apex, and its being refused by the court. (P. 480.) A reference to the brief of the plaintiff in error in that case will show that the right to follow the dip by reason of the position of the apex was the only point made, and the only question raised on the appeal. Besides, in disposing of the question of location, the Supreme Court say, that a valid location of the Adelaide could only have been found under the court's instructions by finding a vein therein; and it therefore assumes that there was an apex or outcropping within the surface of the Adelaide. That branch of the case is disposed of in *fifteen lines* while *a page and a half* are devoted to the side line question, which the court approach in this way: "But there are other grounds, equally conclusive, against the contention of the defendant below," etc. Rather emphatic language for an *obiter*. The other rules established in the *Elgin Case*, that no new or judicial boundary lines to a claim may be projected, but that the survey lines must control, does not, in words, touch the question here at issue, of the right to the dip; but it is, we submit, conclusive against the pretensions of all the counsel for respondent, both of which imply the drawing of new lines, or, as stated in one of the briefs, the "establishment" of new lines; the very thing prohibited by the *Elgin Case*, and the very thing contended for in the dissenting opinion in that case. And, if the rule of the *Elgin Case* is conclusive as against both pretensions, the appellant's claim is the only one left. Mr. De Wolfe, though contending that the cases cited by appellant have very little if any application, on page 7 of his brief, quotes from the *Iron Silver v. Elgin Case* what he claims to be a clear refutation of the position taken by the appellant. Let us apply the principle of interpretation invoked by him, very correct in itself, that general expressions in an opinion are to be taken in connection with the facts of the case in which the expressions are used, and thereby limited. The fact of the *Elgin Case* was, that the vein, instead of dipping out of the claim, through the lines which crossed the apex, as in the case at bar, dipped away from those lines. No occasion, therefore, to state in so many words that the side line becomes the

end line on the dip as well as the strike. Counsel's inference from that case would be forbidden even by the force of the rule of interpretation he invokes, as well as by the reason of the rule of the decision which excludes judicial "establishment" of lines and defines end lines.

Mr. De Wolfe says that the appellant does not discuss the statute, but merely the decisions on the point. Section 2320 was declared, in the *Flagstaff Case*, to mean that locations to conform to the statute must be made *along* the vein, and not *crosswise* of it; from which it follows that a location made crosswise of the vein, as the Amy, for instance, does not conform to the statute, and is one not contemplated by the statute, and, therefore, not within its purview, or entitled to the benefit of the extralateral right given by the statute to claims which conform to its provisions.

DE WITT, J. — The case at bar involves the construction of section 2322, Revised Statutes of the United States, or, rather, the application of the facts of the case to that statute.

"Sec. 2322. The locators of all mining locations shall have the exclusive right of possession and enjoyment of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

As said by Mr. Justice Field (*Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 206): "This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. . . . The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein."

We may add to these words that further difficulties arise when we are obliged to apply the statute to facts not wholly within its contemplation. If a mining location be made regularly—made so that the strike of the vein crosses the location from end line to end line, and at right angles to said end lines—there is nothing in the statute to construe or interpret. (*Flagstaff S. Min. Co. v. Tarbet*, 98 U. S. 469; *Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 205; *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 485.) “There is no patent or latent ambiguity.” But when veins or their strike cross the side lines, or a side line and end line, at all conceivable angles, difficulties confront the courts that can best be fully met by legislative aid. Until such aid is invoked, the courts must follow the statute and previous construction as closely as the varying facts permit. (*Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 208.) The history of mining has proven that the law of May 10, 1872, and amendments thereto, do not afford clear, adequate, and simple solution for some of the practical conditions that arise in the development of the mining industry. The case at bar is a notable instance. It is a first impression in this court, and all other appellate courts.

Three solutions of this interesting problem are urged upon our consideration. Neither one is absolutely free from possible criticism, in view of prior construction of the statute, applied to cases where the facts departed from the regularity, seeming to be contemplated by the law. The facts in this case we cannot ascertain have ever been before any court. We do not approach the consideration of the case with the assurance that we might possess were we able to follow a path that had heretofore been even partially opened. The situation is such that we do not feel prepared to pronounce an *ex cathedra* utterance. We are obliged to plow a furrow in virgin soil. It will be our endeavor to apply a view to the facts which shall seem to us most consonant with the true intent of the statute, and most in accord with the adjudicated cases in the United States Supreme Court, wherein the rights claimed under irregular locations have received the consideration of that court.

Without attempting scientific discussion, we believe we can give a few practical definitions, to indicate the sense from the

miner's point of view, in which we shall use certain terms in this opinion.

Experience has shown that the precious mineral deposits, except what are commonly called "placers," as a rule lie in veins. Mr. Justice Miller (*Iron Silver Min. Co. v. Cheesman*, 116 U. S. 533), says: "What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted. Mr. Justice Field, in the *Eureka Case*, 4 Sawy. 311, says: 'A fissure in the earth's crust, an opening in its rocks and *strata* made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode in the judgment of geologists; but to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock;' the "neighboring rock" being called in the miner's language the "country," or the "country rock."

A vein, to the miner, is a body of ore, quartz, or mineral-bearing substance, lying within the crust of the earth, bounded on each side by the country rock, greatly varying in width, and extending in length, across and through the country for greater and less distances. The direction of the vein so across and through the country is called the "strike." The direction of the vein, as it goes downward into the earth, is called the "dip." The dip, in different veins, and in the same vein sometimes, varies from a perpendicular to the earth's surface to an angle, perhaps, only a few degrees below the horizon. The dip is spoken of from three different points of view:—

1. As to its inclination from a perpendicular or a horizontal, as so many degrees from the perpendicular or from the horizontal. A vein is thus described as having a dip of 20 degrees, 30 degrees, etc.

2. As to the direction it takes from the strike or apex, by the points of the compass. If the strike were due east and west, and the vein in its course downward departed from the perpendicular at an angle, so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft, the dip, in this point of view, would be said to be due north, or, the conditions reversed, due south. In this respect the dip—that is, the direction of the dip—is said to be, and is, at right angles to the strike.

3. The dip is again spoken of as the portions of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward, leaving the apex further from and above him at each advance. He follows the strike when he works lengthways of the vein on a level; that is, when he is advancing along the vein, neither rising towards the surface of the ground nor descending, but going on a level with the plane of the earth's surface.

A failure to distinguish these three views of the dip in using the word sometimes leads to confusion. As we shall use the term "dip" frequently hereinafter, for the sake of definition, let us call the dip from the first point of view the inclination dip, the second the compass dip, and the third the practical dip; for this is the practical idea of the miner when he speaks of following his dip.

Under these definitions, a vein absolutely perpendicular to the plane of the earth's surface, an occurrence rarely if ever encountered, has no inclination dip or compass dip. It has only the practical dip. But in actual mining veins possess a dip from all three points of view. Keeping these definitions in view, we believe that some expressions of courts and arguments of counsel become more clear. This word "dip" is not used in the act of Congress cited above. The expression there is "course downward." "Dip" is the miner's word which has attained the significations above defined.

The highest point of such vein or body as we have described is the apex. The apex may or may not reach the surface of the ground.

The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior

boundaries, or which lies within perpendicular planes drawn downward indefinitely on the lines of those boundaries. The miner may follow the "dip," using the word in either of its significations, wherever it goes, provided he has the apex as a basis of operation, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires or is able to work downward, and that at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex. (*Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 205.) It seems that such grant by the statute to the miner, in view of the geological facts and history of veins, and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all, and only that portion of the solid contents of the earth included in a parallelepipedon formed by dropping vertical planes downward on the line of each side of such parallelogram; and the intent of the statutory grant of section 2322 is that the miner may follow his vein on the dip, but not on the strike, if it departs from the parallelepipedon indicated.

Therefore, if the miner locates his claim regularly—that is, as the statute contemplates that he will—he has all that the statute intends to give him. (See cases cited *supra*.) If he "will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences" (*Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 207); that is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip.

But, in order for the miner to make his location in exact conformity with the intent of the law, he must know, when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will locate so that the strike shall pass through the middle of each end line, leaving 300 feet of surface ground on each side of the vein. But the true strike is

often ascertainable only after immense sums of money are expended in development. He has twenty days, under our statute, to determine this important matter, which may take years to fully demonstrate. If in this helpless condition the prospector commits an error of geological judgment, and upon such error he expends the toil of years, and that toil has wrought its reward, we are of the opinion that the statute should be so construed as will come the nearest to giving to him that whole section or block of the vein which we have above indicated that it is the intent that he shall have, as is consistent with the amount of apex which he has happened to secure by his surface lines, and their planes extended downward.

In the light of these views, we will proceed to examine the three theories of the end line plane, presented for our consideration.

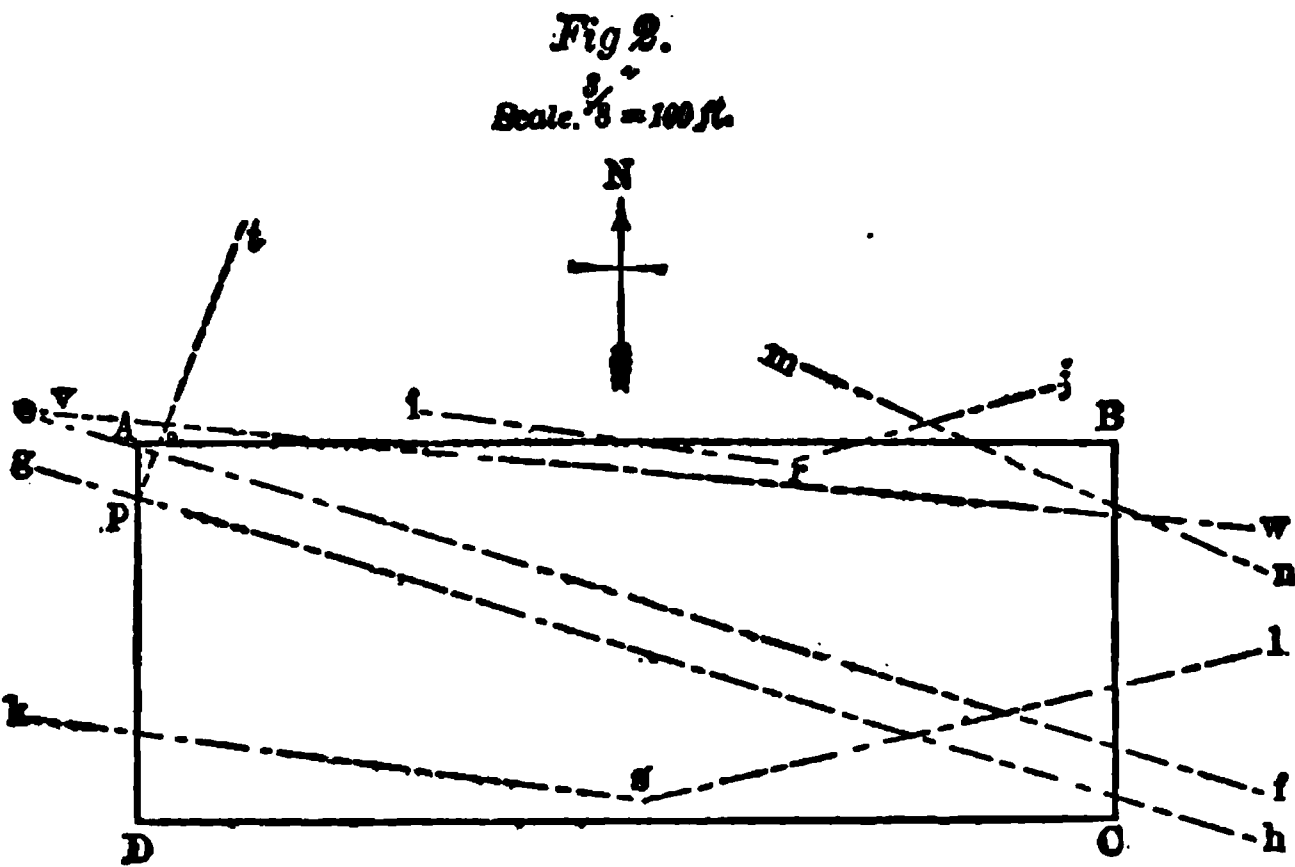
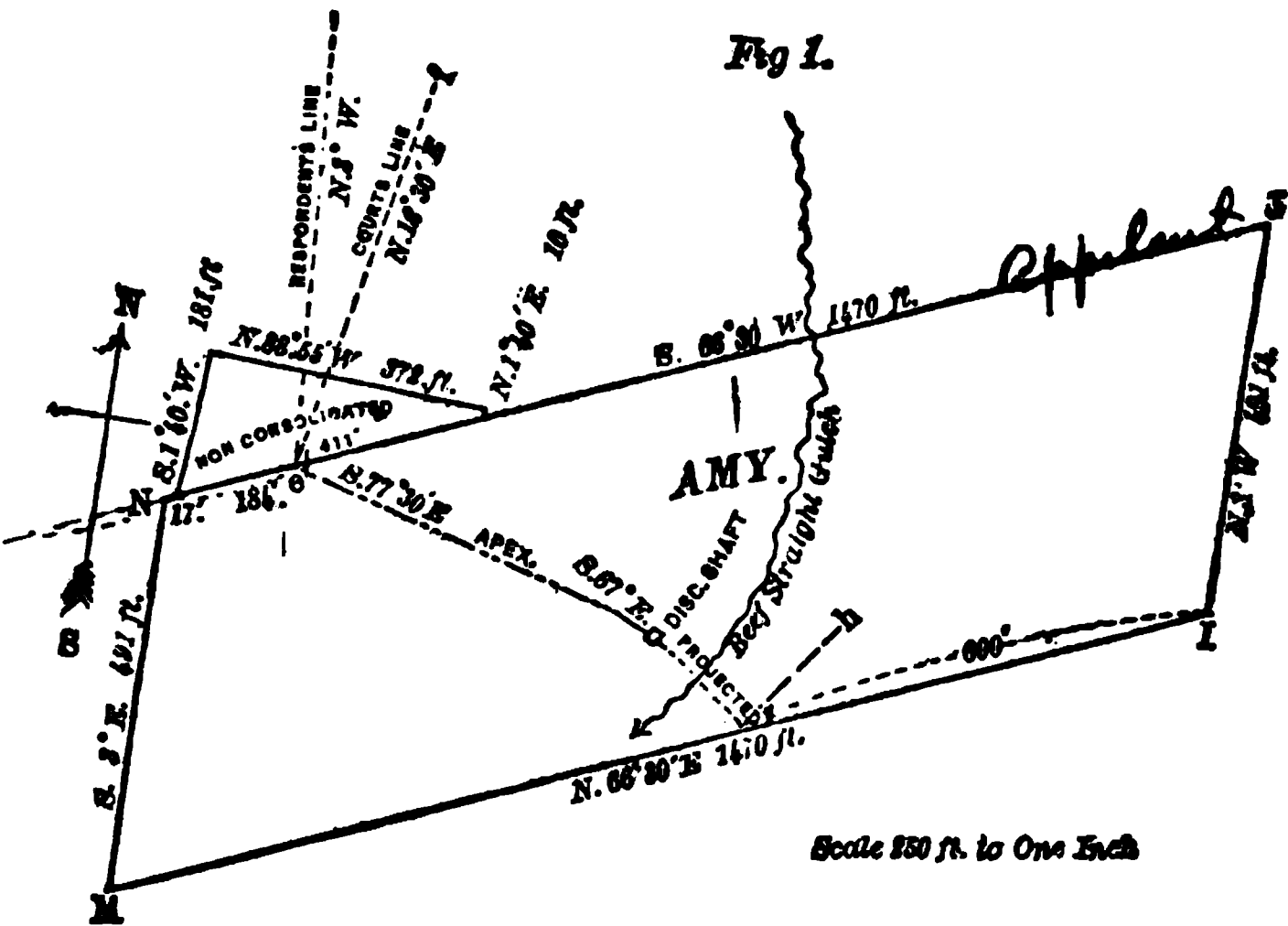
1. The court's theory.

In this view the line that fixes the bounding plane is at right angles to the strike of the vein at the point where it leaves the Amy north side line. (On Fig. 1, the line is indicated by the letters *e, f*.) The plane drops perpendicular from that line. Counsel for appellant calls this a judicially established plane—a plane created by the court, and not by one of the location lines. Respondent's counsel, who holds this theory, vigorously protests against this term, and asserts that the plane is not judicially established, but is that intended by the statute. This, however, is only a terminological contention. Our own infirmity of language is such that we cannot better designate this line and plane than as does appellant. It is in no sense an original line or plane of the surface boundaries as located, nor a projection of, or parallel to, any of them. It is not a line fixed by location, nor ever fixed, except by the decree of the court below.

The United States Supreme Court cases, cited by all the counsel, are *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463 (*The Flagstaff Case*); *Iron Silver Min. Co. v. Elgin Min. Co.* 118 U. S. 196 (*The Horse Shoe Case*); *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478.

If there be one legal principle that is announced with more clearness and frequency than all others throughout all these cases, it is that "the boundary planes shall be definitely determined by the lines of the surface location, and that they shall

not be subject to perpetual re-adjustment, according to subterranean developments made by mine workings." (*The Elgin Case*, 118 U. S. 207. See, also, 205, 206.)



The bounding planes must be drawn by reference to the original surface location lines, and may not be established arbitrarily at the judgment of the parties, or the courts at a later day. The original location fixes the planes.

We are forced to conclude that the court's theory is not in

accord with this principle. The plane established is purely a judicial one. It has neither parallelism nor coincidence with, or projection from, or reference to, the planes of any of the original surface lines. It is not "determined by the lines of the surface location." It was never marked on the ground by the location, nor is it referable thereto.

The whole theory of the advocate of this position is based upon the fact that he takes but one view of the dip—that which we have called the "compass dip." The dip, in this respect, is, as counsel insists, at right angles to the strike. Then, from this single point of view, he argues that, when the miner follows the dip, he may go downward from the apex only at right angles to the strike, and limited further by the planes of the original location end lines. We take his own language from his brief, as follows:—

"The judge before whom the trial was had held that lines drawn at right angles through the vein or lode, where it crossed the side lines, and these lines extended in the direction of the dip of the vein until it intersects a vertical plane drawn downward through the end lines of the location, and continued in the same direction to the place of intersection, constituted the true dip of the vein, and the part which the locator was entitled to follow in its downward course."

This is a fair and succinct statement of the position of the court below and counsel here.

We cannot but remember that this case not only determines the rights of the parties hereto, but that the decision will form an important precedent for future adjudication in the courts of this State. If we adopt the court's theory, we must abide by its legitimate consequences. The planes in this case would be drawn on the lines *e, f*, and *g, h*. (Fig. 1.) We must then follow the plane *g, h*, until it meets the plane of the east original end line, the line *I, J*, on the figure, extended in its own direction northerly, which latter plane, in its northward course, afterwards meets the plane *e, f*. Thus, three end line planes operate as boundaries, and the portion of the vein that the miner takes runs to a point. This result cannot be the intent of the statute. This is not the section or block of the vein in its entire depth, which the law intends to grant.

Again (in Fig. 2), on page 423, let the parallelogram, A, B, C, D, represent a location. The strike of the vein crosses the location, entering the east end line near the southeast corner, and passing out of the west end line near the northwest corner, as the line *g, h*, on the figure. The inclination of the dip is northerly. Counsel's westerly boundary plane on his theory would run northeasterly, at right angles to the strike at the point of departure from the west end line (the line *p, t*, on the figure). The section of the vein taken again runs to the point of a wedge. The miner is deprived of the portion of the vein on the dip lying north of the north side line, and between the plane of his artificially established end line (the line *o, t*) and the plane of the original west end line D, A, projected in its own direction. This portion of the vein it has never before been doubted, that we are aware, would belong to the owner of the apex of the vein *g, h*, lying between the protected planes of the located end lines.

Again, the vein may enter an end line, and pass out of the side line, as the line *m, n*, in Fig. 2; or take a deflection, as the lines *i, r, j*, or *k, s, l*. These are possible, and quite probable, and we believe actual, occurrences in fact. The application of counsel's theory leads to results from which we must retreat. In fact, in innumerable practical examples, where a claim is not located with absolute statutory regularity, the miner is entirely cut off from following his dip, and cut off at a greater or less depth, depending upon the inclination of the dip, and the angle at which the strike passes out of a surface line.

In the case before us the court drew the boundary plane at right angles to the strike, as it seemed to be demonstrated, at the point of departure from the north side line. The departure at the south side line is not definitely determined. If, in its course over the Amy location, the vein takes a deflection, as seems probable from the findings of the court, the court's bounding planes will not be parallel, and the portion of the vein secured will run to a point or into a fan-shaped section. If the court would draw the planes by reference to the general average strike of the vein throughout its whole extent, this could not be accomplished until extensive developments had been made on the vein over, perhaps, many locations thereon.

We are of the opinion that the view of the District Court is

not sustained by the statute or the adjudicated cases, and that its adoption threatens the security of mining titles. We are therefore obliged to disavow its doctrine.

This conclusion, however, does not determine the case. We are compelled to announce a construction of the law and the facts upon which judgment may be ordered entered below. This involves a discussion of the appellant's and respondent's theories. We will first examine the former.

2. The appellant's theory.

The controlling principle of section 2322, and the decisions thereunder, is that the miner has title to all veins, the apex of which lies within the vertical planes of his surface lines, although such veins, in their inclination on their course downward, cross the vertical plane of a side line, provided that such exterior parts lie within the projected planes of the end lines.

We are unable to escape the conclusion that the application of the appellant's theory in the case before us violates this principle. Referring to the plat (Fig. 1), it will be seen that if the Amy people go down upon their dip (using the word in any of its significations, and especially as to the compass dip) from any point on the apex, they will, at greater or less depth, depending upon the distance from the point where the apex crosses the north side line, encounter the vertical plane of that line; and if that plane is to cut them off upon the dip, and be the end line, the provisions of the statute and the universally accepted construction of the mining law are plainly subverted. Counsel holds that if the strike cross a side line, that such side line becomes an end line for all purposes. A better illustration of the revolutionary character of the theory could scarcely be presented than the one at bar. But, if it be correct, we must not shrink from its necessary results. Side lines are frequently not parallel. If the strike crosses two side lines not parallel, and these are made end lines, the section of vein taken constantly narrows if the inclination be towards the small end of the location, or widens if the inclination be in the other direction. In fact all the supposititious cases applied to the court's theory develop equal disasters under the one now considered. Referring again to Fig. 2, the vein indicated by the line *m, n, or v, w*, will have bounding planes not parallel, but at an angle to each

other, and often a right angle. If the compass dip were northeasterly, the section acquired quickly runs to a point. If it was southwesterly, it would develop into a fan of infinite proportions, unless we applied the two other lines of the claim as end lines, and had four in operation. The vein i, r, j , would have end lines coincident; that is, there would be but one end line. The single plane of the north side line would cut off a northerly dip in a short distance downward; or, if the dip were southerly, would counsel call into requisition the original end lines, after the vein passed the south side line plane, and have three end lines taking effect?

And here we stop to observe that, in the discussion of each of the theories, we are considering the effects of the doctrines upon the portions of the vein on the dip lying outside of the vertical planes of the side lines. Those portions inside the vertical planes of the surface lines of the location are controlled by the general provisions of section 2322.

The appellant's view was urged in a learned argument by counsel; but we feel that we must conclude that in the case at bar it seems to be contrary to the theory and intent of the mining law. We are constrained to disavow the doctrine.

3. The respondent's theory.

We have arrived at our approval of this doctrine, partially upon what the logicians call the principle of exclusion. We believe, however, that the position is independently sustainable by its own reason, and upon previous construction. Its advocate also protests against calling his line or plane a judicially established one, and contends that it is established by the original surface lines; that is, by reference thereto, under the control thereof, and in accordance therewith. In the *Elgin Case*, 118 U. S. 206-208, we find the following, in the opinion of Mr. Justice Field: "The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface. . . . It is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to per-

petual re-adjustment, according to subterranean developments made by mine workings. . . . The provision of the statute, that the locator is entitled throughout their entire depth to all the veins, lodes, or ledges, the top or apex of which lies inside the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. . . . This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the *Flagstaff Case*."

From those utterances, and from the tenor of this case, as well as the *Flagstaff* and *Argentine Cases*, we believe that we may conclude that the bounding planes, sought to be applied in the respondent's theory to the facts of the case at bar, may properly be said to be "determined by the lines of the surface location."

In the *Flagstaff Case* and the *Argentine Case* the strike of the vein was at right angles to the side line of the location, or, as the court in the former case says, practically so, and, for the purposes of the decision, treated as such. Therefore, in those cases, the vital matter before the court was not a question of the dip, but rather one of the strike, and the spirit of those cases seems to us to be that, when the strike passes out of the location through any surface line, that surface line, and its vertical plane, cut off the strike, and the miner may not follow the strike beyond such plane.

We are aware that there is language used in the *Argentine Case* that looks towards the adoption of the appellant's theory herein, in the sense that the side line, under the circumstances of the case at bar, must be an end line to limit, by its vertical plane, the dip, as well as to stop the pursuit of the strike. But there is a vital difference between the facts of the *Argentine Case* and those now before us, and the language therein must be viewed in connection with the facts in the case before the learned justice. Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 399, says: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The ques-

tion actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Mr. Justice Field is the judicial father of the mining law of the United States. By his legal learning, and his practical knowledge of mining, he has illumined the path of the history of mining adjudications. His words in the *Argentine Case*, and those of Mr. Justice Bradley in the *Flagstaff Case*, were not spoken of facts such as those now before this court; and we cannot consent that those distinguished jurists would admit that their language sanctions the doctrine that appellant applies to the Amy-Non-Consolidated situation.

Turning to the *Horse Shoe Case*, the other of the three leading cases cited, the facts were also entirely variant from those now before us.

These three United States cases have compelled that court to endeavor to cast into the Procrustean bed of the statute individuals that strained the mould into which they were forced. But we believe that we may legitimately conclude from those cases that, in the facts now before us, the principle is that the north side line of the Amy terminates the strike of the vein, and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines, as below considered. The object of parallelism in the end lines is that the locator may have his full section of the lode in its entire depth. But the determination of the strike of the Amy at a point on the side line deprives them of the dip northwest of that point, because the dip, in that portion, lies under the apex of the Non-Consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end line plane, that plane must take effect where the strike in fact ends; that is, at a point on the side line

(point e, Fig. 1); and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east end line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any re-adjustment according to subsequent developments. The parallelism of the end line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line.

Complications are soluble upon this theory. The intent of the statute seems to be secured.

We will notice some objections made to this doctrine, but which we believe are not sustainable. It is urged that the principle will not apply to a vein, the strike of which crosses the location at exact right angles to the side lines. But here there would be no dip in question. The side line would bound the strike, as in the *Flagstaff Case*.

Again, it is suggested the Non-Consolidated surface location happens to be almost exactly parallel in its lines to the Amy. If the Non-Consolidated had been located with its end lines at right angles to the strike of the vein in the Non-Consolidated ground, that is, parallel to the court's line (Fig. 1), then it is objected that, if the Non-Consolidated go down on the dip, within the planes of such end lines, and the Amy go down within the planes as we define them, a collision would occur under-ground. If so, such conflict would be adjustable by priority of title.

Again, it is urged that the Amy has an apex on the surface of a length, as it runs from south to north side line, but that under this theory, at a depth, the strike is shorter, and only of a length equal to the shortest distance between the bounding planes. This objection is based upon an error in the geometrical view, as may readily be shown by descriptive demonstration. A level run on the vein at one hundred, five hundred, one thou-

sand, or any number of feet in depth, would be parallel to the strike at the highest point, and of equal length.

Of the three theories which have been presented to us for application to this case, we approve and adopt the last considered.

In accordance with this view, let the judgment entered in the District Court be modified in this particular: that the plane bounding the portions of the dip of the Amy vein, lying north of and outside of the Amy north side line, shall be drawn from the point where the apex crosses that north side line, and in a direction north, 3 degrees west.

The case is remanded, with directions to the District Court to enter judgment accordingly.

BLAKE, C. J., and HARWOOD, J., concur.

LLOYD, APPELLANT, v. SULLIVAN, RESPONDENT.

ELECTIONS — Supreme Court — Jurisdiction on appeal in election contest — Construction of statutes. — Section 1044, fifth division of the Compiled Statutes, provides that election contests of county officers shall be tried by the District Court, and the person decided by said court to be elected shall be entitled to hold the contested office "until such decision shall be reversed on appeal." Section 418 of the Code of Civil Procedure provides that "a judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this act." Section 444 of the Code of Civil Procedure provides for an appeal to the Supreme Court from the District Court "from a final judgment . . . entered in an action or special proceeding," and "from an order granting or refusing a new trial." The Constitution, article viii., section 8, declares that "the appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity." Section 11 defines the jurisdiction of the District Court to extend to all cases in law and in equity, including certain enumerated cases, "and for all such special actions and proceedings as are not otherwise provided for." Section 15 allows writs of error and appeals "from the decisions of said District Courts under such regulations as may be prescribed by law. *Held*, that these provisions when construed together extended the appellate jurisdiction of the Supreme Court to all cases, actions, and proceedings which have been finally decided in the District Courts, and included an appeal from an order refusing a motion for a new trial in an election contest.

SAME — Pleading — Issue — Validity of returns. — In the case at bar, the statement of contest alleged that the county clerk, disregarding his duty, issued a certificate of election to the respondent, claiming in support of such illegal action to have knowledge of the return of a large number of votes for respondent from a particular precinct, which said return had not been included in the abstract of votes, and which said votes had they been so returned would have given respondent the highest number of votes for the office; that there were no legal returns from said precinct. These allegations were denied by the respondent in his answer. *Held*, that the issues raised by the pleadings involved the question of the validity of the returns from said precinct.

9	577
18	852
9	577
25	488
9	577
27	126

SAME—*Fraud—Evidence.*—In the case at bar an election at a particular precinct was conducted by three judges instead of five, as required by law. The clerks selected to serve performed no clerical duties, but signed the returns the second or third day after the election. The canvass of the votes was conducted privately, and not in public as required by law, several persons being ejected, and others who sought admittance found the doors locked. The certificate of the returns was irregular, being certified by the judges and attested by the clerks, instead of being certified by the clerks and attested by the judges. The poll-book showed that after the judges and clerks had voted, the entire remainder of 169 electors cast their ballots in alphabetical order, and that every elector voted for a candidate for every office, and for or against the constitution. It appeared in evidence that all the electors did not vote for or against the constitution; that one elector did not vote, though his name was on the poll-book as having voted; that some electors did not vote for certain candidates, and some votes were returned for candidates other than for whom they were cast; that ballots were stamped by the judges after the polls were closed; that the voters did not go to the polls in alphabetical order. *Held*, that the returns of such precinct were fraudulent, and did not truly state the vote which each candidate for office received at the election.

SAME—*Evidence—Subpoenas.*—Subpoenas, with their returns duly verified, showing the names of voters at a particular precinct who could not be found, are admissible in evidence in an election contest to establish diligence on the part of the contestant in seeking to procure the best evidence. (*Case of Heyfron v. Mahoney, ante*, p. 497, affirmed.)

SAME—*Fraud—Burden of proof as to legal votes.*—In an election contest where fraud at a particular precinct is shown, both by direct and circumstantial evidence, the entire vote of such precinct must be rejected. The legal votes cast are not invalidated by the fraud, but the person claiming the benefit of such votes must prove them.

Appeal from Second Judicial District, Silver Bow County.

The contest was tried before MCHATTON, J., without a jury.

Thompson Campbell, for Appellant.

Contestant brings this action under section 1043, fifth division of the Compiled Statutes, to determine which of the two candidates for the office of sheriff is entitled to the same, "in such manner as shall carry into effect the expressed will of a majority of the legal voters." Issue was joined as to the number of legal voters who voted at precinct 34, of the county of Silver Bow, and upon other issues raised by the pleadings. The contestant offered certain subpoenas and the returns thereon to show due diligence to procure the evidence of the persons illegally voting at said precinct, which offer was refused by the court. Upon this refusal of the court, contestant's proof of illegal votes and for whom cast was made by other evidence. (*McCrary on Elections* [3d ed.], § 460, et seq., and cases cited.) The contestant

assumed the difficult task of proving a negative, i. e., the want of qualification of a large number of voters, and the doctrine is well established that slight proofs make a *prima facie* case when a negative is to be proved. In all such cases rebuttal is comparatively easy, and is consequently of imperative obligation. (*Russell v. McDowell*, 83 Cal. 70.) Respondent offered no proof in rebuttal, and the evidence of contestant stands absolutely uncontradicted.

The returns of precinct 34 should not have been admitted in evidence for the reasons: (1) That they were not made out by the proper officers—the clerks of election. (2) The clerks of election did not participate in the canvass of the votes, and were not present at any time during the canvass of the votes. (3) The clerks of election did not certify to the correctness of the returns. (4) Two of the judges of election only canvassed the returns. (5) The polling place where the so-called canvass was being conducted by two of the judges was not in public; the door was kept locked and the windows covered so that the public could not and did not witness the canvass. (6) The returns are not certified as by statute required. (7) The clerks of election signed their names to the returns, as attesting, two days after the alleged canvass of the votes. (8) The clerks should have certified and not attested. (9) Three judges certified the returns, only two being present at the canvass. (10) The third judge, one O'Regan, not being present at any time during the canvass, but certified to them notwithstanding. (11) One of the judges, Pennycook, made out the alleged returns. (12) Pennycook and Morrison, two of the judges, conducted the canvass of the vote alone and secretly.

The evidence shows great frauds to have been practiced by the judges of election at precinct 34. (1) Morrison, one of the judges, endeavored to induce a person (Omo) not a voter of said precinct to vote in the name of an absent registered voter of said precinct. (2) Ballots were marked by one of the judges for identification when handed by a voter to be placed in the ballot-box. (3) A large number of ballots were destroyed, and others stamped with the "official stamp," and marked for the Democratic candidates. (4) The return shows 172 votes for the constitution and 2 votes against—the whole number of votes

cast at that precinct being 174. (5) The evidence shows 5 voters who did not mark their ballots for or against the constitution, unimpeached and uncontradicted. (6) The return shows 171 votes for the Democratic candidates, and but 3 votes for a majority of the Republican candidates. The evidence shows 5 voters voted for the Republican candidates at said election at said precinct. (7) The evidence shows a clear disregard of the mandatory requirements of the election laws with actual fraud as makes the true result doubtful.

The poll-book in evidence shows the voters at precinct 34 to have voted in alphabetical order. If the law was strictly complied with, if they so voted, and the presumption is that they did so vote, then they must have been under control and duress. If not, then the election law was disregarded by the officers of election, and the poll-book or list of voters voting was made up after the close of the polls, and copied from the check list by one of the judges, contrary to law. This is ground of throwing out the entire vote of the precinct, where there is no means of purging the poll. (*Russell v. McDowell, supra.*) Officers of elections are, like all other persons, presumed to know the law, and their deliberate omission to follow directions designed to prevent fraudulent voting, coupled with actual fraud, is ground of throwing out the entire vote of said precinct 34. The evidence is clear and uncontradicted of the fraudulent acts of the officers of election, and if no more, casts suspicion upon their integrity, and is sufficient, *prima facie*, to make out a case of fraud, and to so taint the returns that they are not to be received as proof of any fact sought to be proven by them. (*Russell v. McDowell, supra.*) The *prima facie* case made out by the contestant, as to the misconduct of, and frauds committed by the judges of said election, in the absence of any rebutting proof on the part of respondent, makes out a strong case on the part of contestant of misconduct and fraud by the said election officers, and directly impeaches the return of said precinct, rendering it valueless as evidence for any purpose. The court ignored the uncontradicted evidence of the witnesses produced by contestant, and has expunged and stricken out material evidence of said witnesses on the trial, disregarding the plain rules of elementary law.

This court should render final judgment in this cause. Any other rule in this class of cases would render them interminable, whereas these actions are intended to be summary, and to be brought to a final conclusion as soon as possible. To that end the whole case should be brought here on appeal, so that it may be finally settled without further litigation. Not only the interests of the parties, but those of the people who are also concerned in this class of cases, demand this practice. (*People v. Nichols*, 34 Cal. 217.)

John W. Cotter, and *M. Kirkpatrick*, for Respondent.

The appeal is not from the judgment but from an order overruling the contestant's motion for a new trial. A motion for a new trial does not lie in election cases, and therefore the court did not err in denying such motion. (*Dorsey v. Barry*, 24 Cal. 449; *Casgrave v. Howland*, 24 Cal. 457; Hayne on New Trial and Appeal, § 5.) This court has no jurisdiction of the appeal in this case. The appellate jurisdiction of this court is defined by the constitution of Montana as follows: "The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity, subject, however, to such regulations and limitations as may be prescribed by law." (Art. viii. § 3.) An election contest is not a "case at law," nor a "case in equity," within the meaning of the constitution. It is in its nature a special statutory proceeding, wholly unknown to the framework of the common law. (*Saunders v. Haynes*, 13 Cal. 152; *Dorsey v. Barry*, *supra*; *Casgrave v. Howland*, *supra*; *Norwood v. Kenfield*, 34 Cal. 332; *Houghton's Appeal*, 42 Cal. 56; *Bixler's Appeal*, 59 Cal. 554; *Keller v. Chapman*, 34 Cal. 635; *Moore v. Mayfield*, 47 Ill. 167; *Ex parte Wimberly*, 57 Miss. 437, 447, 450; *Wright v. Fawcett*, 42 Tex. 206; *Gibson v. Templeton*, 62 Tex. 555; *Duson v. Thompson*, 32 La. An. 861; *Colin v. Knoblock*, 25 La. An. 264; *State v. Dubuclet*, 28 La. An. 703; *French v. Lighty*, 9 Ind. 475; *State v. Commissioners*, 31 Ohio St. 455, 456; *Ellingham v. Mount*, 43 N. J. L. 472; *Handy v. Hopkins*, 59 Md. 157.) The constitution in defining the jurisdiction of the District Courts distinguishes "special actions and proceedings" as separate and distinct from "cases at law

and in equity." (Art. viii. § 11.) The legislature cannot confer upon the Supreme Court, nor on any other constitutional court, a jurisdiction not granted to it by the constitution. (*Parsons v. Tuolumne Water Co.* 5 Cal. 43; *Caulfield v. Hudson*, 3 Cal. 389; *Ex parte Attorney-General*, 1 Cal. 85; *People v. Kern County*, 45 Cal. 679; *Camron v. Kenfield*, 57 Cal. 550; *Farmers' Union v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210.) As regards the jurisdiction on appeal in special cases of the Supreme Court of California, under the constitution of that State, there has been much doubt and fluctuation of opinion on the part of the court; and such appeals, when sustained, have been sustained, not upon the language of the constitution, but on the ground of a long and unquestioned practice to that effect, the court appealing to the maxim, *contemporanea expositio est fortissima in lege*. And as yet the rule can hardly be said to be settled there in favor of the jurisdiction. (Hayne on New Trial and Appeal, § 179.) But here the maxim does not apply. Under the constitution of Montana there has been in this regard no practice whatever. This is the first case, and the jurisdiction being challenged *in limine*, the court is at liberty, untrammelled by previous decisions, to give to the language of the constitution its proper construction. If it be said that the convention took the provisions in question from California (as to which we know nothing) and adopted her construction along with it, the reply is that such construction is not binding on the court, and even were it a settled one, it cannot reasonably be said that this court must adopt a construction which her own courts tacitly admit is not authorized by the language of her constitution. That the territorial Supreme Court had such jurisdiction is true, for the jurisdiction of that court was as fixed by the territorial statute; but although those statutes are now statutes of the State, they cannot confer jurisdiction on this court, whose jurisdiction is fixed by the constitution and not by the statute.

The *prima facie* right of the respondent to the office is admitted by the pleadings, and also established by the evidence of contestant. It is alleged in the complaint that independently of precinct 34, contestant received 3,490 and respondent 3,363 votes; that at precinct 34, 165 votes were cast for respondent and 9 for contestant. These facts are also alleged in the answer

and not denied in the replication. They were also proven affirmatively by contestant, who introduced the abstract made by the county board of canvassers, and also the returns from precinct 34, for the specific purpose, as announced at the time, of proving how many votes were polled thereat for Sullivan and how many for Lloyd. This shows a majority of 29 for Sullivan on the whole vote cast in the county for the office of sheriff. The pleadings also admit that the returns from precinct 34 are valid on their face. True, the complaint alleges there were no legal returns from that precinct—a conclusion of law. The answer, on the other hand, sets out the facts which constituted those returns, none of which are denied by the replication. The facts so admitted are embodied in finding 5 of the court, and establish that the returns are regular in form, and show the vote cast and for whom cast—the true result of the poll. Says Mr. McCrary: “The rule is that the return must stand until impeached, i. e., until shown to be worthless as evidence—so worthless that the truth cannot be deduced from it.” (McCrary on Elections, § 480.) The contestant also admitted the truthfulness in this respect of the returns from precinct 34 by introducing them in evidence, to show the vote polled for the office of sheriff thereat. That this was a sufficient *prima facie* case for respondent. (See *Brown v. Jeffries*, 42 Kan. 605.) Respondent’s *prima facie* case was also made out by the certificate of election issued to him by the proper officer, under the circumstances set out in the answer and in finding 6. (McCrary on Elections, §§ 283, 286.)

It being admitted by the pleadings, and also established by the evidence introduced by contestant himself, that 165 votes were polled for Sullivan and 9 for Lloyd at precinct 34, and there being no allegation of fraud, intimidation, or undue influence in regard to this vote, and no evidence whatever impeaching its fairness, it not appearing that any person who voted for Lloyd was counted for Sullivan, nor that any person who intended to vote for Lloyd was, by unfair or fraudulent means, induced to vote for Sullivan, and both parties in fact agreeing upon the same result, it follows that the question of fraud in the conduct of the election at precinct 34, which was thrust into this case by contestant against the objection of respondent, is an imma-

terial matter, and cannot be considered as an element in its determination. Even if fraud were shown at precinct 34, and the returns for that reason were rejected, it could not affect the result in this case; for the inquiry here goes behind the returns and seeks to ascertain the actual vote polled at that precinct for the office of sheriff, and since that fact is known and admitted by all parties, to wit, that 165 votes were polled for Sullivan and 9 for Lloyd, and since there is no charge of fraud or unfairness with regard to this vote for sheriff, it must stand although the returns might fall. Says Mr. McCrary: "If satisfactory proof of the actual vote can be made, and the result thus ascertained, the election may stand although the return falls to the ground." (McCrary on Elections, § 542.)

BLAKE, C. J.—This is an election contest between Lloyd, the appellant, and Sullivan, the respondent, who were candidates for the office of sheriff of the county of Silver Bow at the election held in 1889. The certificates of the nomination of Lloyd by the Republican, and Sullivan by the Democratic conventions were properly filled. The official abstract of the vote cast at the election, according to the canvass which was made October 14, 1889, gave Lloyd, 3,490, and Sullivan, 3,363 votes. There was no other canvass of the vote for these parties, but the county clerk issued the certificate of election to Sullivan.

The statute which governs the procedure and trial of the issues arising in this proceeding provides as follows: "All contests of county officers shall be tried in the proper county, and when an elector shall wish to contest such election he shall file with the clerk of the board of county commissioners, within ten days after such person shall have been declared elected, a statement in writing, specifying the grounds of contest, verified by affidavit, and such clerk shall issue to the contestant a notice to appear at time and place specified in the notice, before the District Court" (Comp. Stats. fifth div. § 1043.) Then follows this section: "Sec. 1044. The district judge, at the time specified in the notice (and it shall appear by the sheriff's return that notice has been duly served on the contestor), shall proceed to try such contest. Each party shall be entitled to subpoenas, and subpoenas *duces tecum*, as in ordinary cases in law,

and the District Court shall hear and determine in such manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes for such office, not regarding technicalities or error in spelling the name of any candidate for such office; and the clerk of said court shall issue a certificate to the person declared to be elected by said court, which shall be presumptive evidence of the right of said person to hold such office, and he shall be entitled to enter upon and hold said office until such decision shall be reversed on appeal." In pursuance of these statutory requirements, the proper notices were filed, issued, and served by Lloyd, an answer was made by Sullivan to the statement of contest, and a replication was filed by Lloyd. It will be necessary to observe carefully some of the proceedings upon the trial, and to prevent any misunderstanding thereon they will be recited in the language of the court below. The following judgment was entered February 24, 1890: "This cause came on regularly for trial on the eleventh day of February, 1890, before the court, sitting without a jury. . . . Whereupon witnesses were examined and other evidence introduced on the part of the contestant and respondent respectively, and the evidence being closed, and the argument of counsel heard, the cause was submitted to the court for consideration and decision; and after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be rendered in accordance therewith. Wherefore by reason of the law and the findings aforesaid, it is by the court ordered, declared, and adjudged that, at the general election held in the county of Silver Bow on the first Tuesday, being the first day of October, 1889, the respondent, Eugene D. Sullivan, received a majority of all the legal votes cast in said county at said election for the office of sheriff of said county of Silver Bow, and was and is duly elected to said office. . . ."

The findings of the facts, which are fifteen in number, contain this statement: "The evidence in the above-entitled cause having been fully heard, together with the argument of counsel for the respective parties, and the same having been submitted to the court for decision, the court, in response to the written request of the parties, makes the following findings of fact from the evidence, and its conclusions of law thereon."

Thereupon Lloyd filed a notice of his intention "to move the court to vacate and set aside the decision of the court rendered in the above cause, and to grant a new trial of said cause." The statement, which was "approved and allowed" March 31, 1890, by the judge of the court below, contains the testimony which was introduced upon the trial, the exceptions which were saved by the appellant, and the specifications of the "particulars in which the evidence is insufficient to sustain the findings and decision of the court." Upon April 3, 1890, "the motion for new trial herein, heretofore taken under advisement, is by the court overruled, and to which ruling of the court plaintiff, by counsel, duly excepts." The notice of appeal states "that the contestant in the above-entitled action hereby appeals to the Supreme Court of the State of Montana, from the order of the District Court of the Second Judicial District of the State of Montana, overruling contestant's motion for a new trial of said action, and refusing a new trial thereof, made and entered in said court on the third day of April, A. D. 1890."

At the threshold of this inquiry the respondent contends that the motion for a new trial does not lie, and that the court has no jurisdiction of the appeal.

The statutes and constitutions of the States vary materially, and it must be admitted that the decisions are not harmonious upon this question. The law of this State, which has been cited, evidently contemplates that the judgment of the District Court shall not be final, for its terms expressly limit the right of "the person declared to be elected" to "enter upon and hold said office until such decision shall be reversed on appeal." The construction sought to be enforced by the respondent renders this provision nugatory, and deprives the aggrieved party of a substantial right. In *Payne v. Davis*, 2 Mont. 382, the value of the property involved in the controversy was fifty dollars; the act of the legislative assembly declared that this court shall have jurisdiction in civil cases "where the amount in dispute exceeds one hundred dollars." Upon the motion of the respondent to dismiss the appeal, we held that "statutes must be so construed as to maintain the right of appeal, if the established rules of interpretation are not violated;" and adjudged that the restriction was inconsistent with the organic act of the Territory,

which allowed appeals "in all cases from the final decisions" of the District Court, and therefore void. The case was then heard and determined upon its merits. Subsequently the statute concerning this subject was amended, and now provides as follows: "The Supreme Court shall have appellate jurisdiction in all cases tried in the District Courts." (Code Civ. Proc. § 697.) Let us consider some sections of the Code of Civil Procedure. "A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this act." (§ 418.) "An appeal may be taken to the Supreme Court from the District Courts in the following cases: *First.* From a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts. *Second.* From an order granting or refusing a new trial." (§ 444.)

The Constitution declares that the "appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity" (art. viii. § 3), and it is claimed by the respondent that an election contest is not included by the word "cases," which has a technical meaning. This construction would confine the jurisdiction of this court within narrow bounds. But it is obvious that full effect has not been given to every part of the instrument, which in this matter is its own interpreter. The eleventh section uses this language in defining the jurisdiction of the District Court: "The District Court shall have original jurisdiction in all cases at law and in equity." Then follows this phrase, "including all cases," which are enumerated, such as "proceedings in insolvency, . . . actions to prevent or abate a nuisance, . . . all matters of probate, . . . actions of divorce, and for annulment of marriage, and for all such special actions and proceedings as are not otherwise provided for." The framers of the constitution have plainly ignored the familiar signification which is attached in the reports to "cases at law" and "cases in equity." This view is confirmed by this section: "There shall be but one form of civil action, and law and equity may be administered in the same action." (Art. viii. § 28.) The fifteenth section of the same article is of vital force in this discussion. "Writs of error and appeals shall be allowed from the decisions of the said District Courts to the Supreme Courts

under such regulations as may be prescribed by law." Construing these provisions together, it is clear that the appellate jurisdiction of this court extends to all cases, actions, and proceedings which have been finally decided in the District Courts. Our jurisdiction is in substance similar to that of the Supreme Court under the territorial government, and this objection could have been urged with equal power before the period of transition to statehood.

The case of *Heyfron v. Mahoney*, ante, p. 497, which was an election contest under the statute *supra* for the same office, was filed July 8, 1889, in the Supreme Court of the Territory, and was upon the docket during three terms. The able and learned counsel for the respondent never questioned the jurisdiction of the appellate court, and argued the cause upon its merits.

The cases of *Dorsey v. Barry*, 24 Cal. 449, and *Casgrave v. Howland*, 24 Cal. 457, support the position of the respondent, that the power of the court which tries an election contest ceases upon the entry of the judgment, and that it cannot grant a new trial, or re-open the issues of law or fact. This conclusion is reached by the construction of this section of the Code of Civil Procedure of the State of California: "Either party aggrieved by the judgment of the court may appeal therefrom to the Supreme Court, as in other cases of appeal thereto from the County Court." (§ 1126.) This is found in the title, which provides for "contesting certain elections." When we consult the chapter regulating "appeals from County Courts," it will be seen that they are limited to "an order granting or refusing a new trial in the cases designated in this section." (Code Civ. Proc. § 966.) Election contests are not specified in the "cases" which are enumerated. But in this State, the District Court possesses jurisdiction of the same matter, and the practice has been uniform that the appellate court will not consider the evidence in the record when there is no motion for a new trial. (*Allport v. Kelley*, 2 Mont. 343; *Chumasero v. Vial*, 3 Mont. 376; *Largey v. Sedman*, 3 Mont. 472; *Broadwater v. Richards*, 4 Mont. 78; *Twell v. Twell*, 6 Mont. 19; *Alder Gulch Con. Min. Co. v. Hayes*, 6 Mont. 31; *Blessing v. Sias*, 7 Mont. 103.) On an appeal from a judgment, the judgment roll alone is brought before this court. (*Chumasero v.*

Vial, supra; *Clark v. Baker*, 6 Mont. 153; *Princeton Min. Co. v. First Nat. Bank of Butte*, 7 Mont. 530.) In *Chumasero v. Vial, supra*, we said: "This appeal has been taken from the judgment alone, and the only questions before us relate to the conclusions of law which must be drawn from the facts." The case of *Princeton Min. Co. v. First Nat. Bank of Butte, supra*, was tried by the court without a jury, and Mr. Justice Bach in the opinion says: "There was no motion for a new trial made; therefore we are to conclude that all of the findings are supported by the evidence; that there was no evidence to sustain the findings requested and refused; and that where there is no finding on any issue, the court found in favor of the plaintiff upon that issue. Such is the rule laid down by the statutes, and from the authorities." This procedure was followed in *Heyfron v. Mahoney, supra*, and has been adopted in some States. (*Govan v. Jackson*, 32 Ark. 553; *Dobyns v. Weadon*, 50 Ind. 298; *Hadley v. Gutridge*, 58 Ind. 307.) We are therefore of the opinion that the appellant was compelled by the adjudications of this court to resort to the practice which is therein defined.

It now becomes necessary to refer to some of the findings of the facts by the court below which are properly before us for review.

5. "The returns of the election at precinct 34 were delivered to the clerk of the board of county commissioners by the said W. A. Pennycook, one of the judges, in person, some time between the first and fifteenth days of October, 1889. . . . The said returns contained the proper tally sheets and extensions, the names of the candidates voted for, the number of votes received by each, written in full length, in words duly certified by the judges and clerks who held the said election at said precinct. . . . The signatures to the said returns are in the true and genuine handwriting of the judges and clerks of election at said precinct, and from an inspection of said returns, the number of votes cast, and for whom cast, can be easily ascertained."

7. "The said returns from said precinct 34 show upon their face, and the court finds the fact to be, that 174 votes were polled thereat at said election, and that the respondent, Eugene D. Sullivan, received at said precinct, 165 votes, and the contest-

ant, John E. Lloyd, 9 votes. At all the other precincts of said county, as shown by the returns thereof, respondent received at said election 3,363 votes, and the contestant 3,490 votes; so that counting the votes cast at precinct 34, together with the votes cast at all the other precincts of said county for the office of sheriff, the contestant, Lloyd, received 3,499 votes, and the respondent 3,528 votes, a majority of 29 votes for said office, in favor of said Sullivan, and the court so finds the fact to be."

11. "The polls were closed at six o'clock as announced, and thereafter, during the evening and night of said day, the said judges proceeded to canvass and count and make out the returns of the votes cast at said precinct."

12. "That A. N. Anderson and Thomas O'Keefe, who were sworn as clerks of election at said precinct 34, performed none of the clerical work thereat, but all the clerical work was performed by the judges, and principally by Pennycook."

15. "On the whole evidence, the court finds that the said election held at precinct 34 in said county on the first day of October, 1889, was fairly and honestly conducted; that no fraud was committed or attempted at said precinct by the election officers or others; that such irregularities as occurred thereat were without fraudulent intent and resulted in injury to no one, and did not affect the result or the fairness of the election; that all voters registered for said precinct who applied to vote were permitted to vote; that no intimidation or undue influence was exercised or attempted upon the voters by any one; that the said judges and clerks, nor neither of them, did not mark any ballot after its delivery by the voters to the judge of election, nor were said ballots marked by the judges of election in any manner, except by the official stamp placed thereon before they were delivered to the voters; and that the said returns from the said precinct 34 express and show the true and correct result of said election held thereat."

It is apparent from the findings of the facts that the election of the appellant or respondent to the office in controversy depends upon the vote of the precinct numbered 34, in the county of Silver Bow. The court below decided that the returns which had been rejected by the board of canvassers were valid, and exhibited the true count of the ballots which had been cast by the legal voters.

This is the battle field of the judicial conflict. We are surprised that the counsel for the respondent maintains that "the question of fraud in the conduct of the election at precinct 34, which was thrust into this case by contestant against the objection of respondent, is an immaterial matter, and cannot be considered as an element in its determination." This was the main issue at the trial upon which testimony was offered by both parties, and the objections of the respondent upon similar grounds were overruled, and the court found distinctly thereon and rendered judgment accordingly.

The record shows that Sullivan had commenced an action against Lloyd, and that, upon a question raised by counsel, the court said: "In these two cases there is only one point to decide, and that is as to who is entitled to this office. It seems to me that it is unnecessary to try both of the cases. The court is only desirous to determine the rights of these parties on the evidence that may be presented to it. I think that from the pleadings presented in these two cases, the case of *Lloyd v. Sullivan* presents all the issues between these parties, and the issue of that will determine the whole matter." The statement of contest says that the county clerk, "disregarding his plain duty, . . . issued a certificate of election to the said office to the said Sullivan; that the said clerk, in support of his said illegal action as hereinbefore set out, claims to have knowledge of the return of a large number of votes for the said Sullivan as returned from precinct 34, said county, and which said returns were not included in the said abstract of votes, and which said votes, if they had been so returned, would, in fact, give to the said Sullivan the highest number of votes for the said office; that in fact and in law, there were no legal returns presented to said canvassers from the said precinct 34. . . . That there were no legal returns, as by law in such cases provided, ever or at all received by said canvassers." The answer denies these allegations.

The transcript shows that the appellant at all times assailed the returns of this precinct, and the conduct of the officers thereof, and pointed out specifically his objections. The respondent did not file a demurrer to the statement of contest, or move to make any part thereof specific and certain, or by any pleading attack the same. In *Heyfron v. Mahoney, supra*, we considered briefly

the nature of this proceeding, and held that it was proper to allow the grounds to be amended to conform to the proof. If the court below had sustained this objection of the respondent, the appellant could propose amendments in compliance with the ruling, and the same issue would have been heard and determined. But we think that the trial was conducted upon the correct theory and interpretation of the pleadings.

This view is entertained by distinguished lawyers, whose opinion upon the issue involved in the contest is entitled to great respect. Hon. George Gray, of Delaware, delivered a speech in April, 1890, in the Senate of the United States, regarding this matter, and said: "I had intended, but I will not detain the Senate longer by doing so, to refer to the opinion of the court of the State of Montana, after the Territory had become a State, in a cause that was properly before it concerning the election of the sheriff of Silver Bow County, in which the whole conduct of that election at precinct 34 was gone into judicially, and judicially found and determined. . . . In the case to which I have just alluded, decided in February, the court makes certain findings. They are very interesting, of course not binding on the Senate, but certainly persuasive, as the judgment of a court upon the facts that were in contest before it in a case pleaded to issue, and in which the issue involved the integrity of these polls." (2 Cong. Record, p. 3104.) The fifteenth finding of fact, *supra*, is then quoted by the honorable senator, who has a bias for the respondent. We have read carefully every speech and document relating to the admission of the senators from this State, and cannot find any expression of dissent from this remark regarding the issue to be investigated by the court below. When we reflect that every observation in that high body of legislators attracts searching and intelligent criticism, the unanimity upon this point is convincing.

The branches of this extensive examination may be treated in four divisions, and we will discuss, in the first place, the conduct of the officers of the election at precinct 34, and the statutes governing them.

It appears that there were three persons who served as judges of election, W. A. Pennycook, John Morrison, and William O'Reagan, the first two named being appointed as Republicans,

and the last a Democrat. The statute requires the number to be five, and that vacancies shall be filled on the morning of the election by the voters. (Stats. 16th Sess. p. 140, § 21; Comp. Stats. fifth div. § 1011.)

"The said judges shall choose two persons, having the same qualifications with themselves, to act as clerks of the election." (Comp. Stats. fifth div. § 1012.) A. M. Anderson and Thomas O'Keefe were evidently selected for this purpose. Anderson, the sole officer of the election who testified at the trial, was called by the respondent, and we quote from the record his answers to questions. "Pennycook wanted me to act as clerk, and I refused, but he said to stay around and he would do it for me.

"There was another clerk appointed, too? Yes, sir. Tom O'Keefe.

"Did he act as clerk? I don't think he did.

"Who did the clerical work? Pennycook.

"Did Morrison do some? Yes, sir.

"So that the clerks did not do the work, that work was done by the judges? Yes, sir. I went away about eight minutes to seven.

"The polls were closed then? Yes, sir. They closed the polls at six o'clock.

"Did Pennycook say anything about going away? No, sir. I asked him at six o'clock if I could go, and he said, yes, you can go to work."

The witness testified that he worked the night before and the night after the election, and upon cross-examination said:—

"You say that you came down according to Mr. Pennycook's orders, to act as clerk of that election? Yes, sir, he sent for me.

"As a matter of fact, did you ever write a line in that election? I never did.

"Who showed you the election returns after the close of the election? Pennycook.

"Where? He showed it to me when he came back from town.

"When he came back from Butte? The next time I saw him.

"Where did he have them? He had the papers in his hands.

"Did you certify that they (the returns) were correct? Yes, sir.

"How did you know that they were correct, if you did not keep them yourself? I don't say that I just know.

"Is it not a fact that you do not know whether they were correct or not? How could I know, when I did not keep them.

"Do you know when Keefe signed those returns? I suppose the same time as I did, the same day.

"Was his name down when you signed? No, he signed after me, I think.

"When did you see Pennycook after that (the closing of the polls and going to work)? I don't know if it was a day or two days.

"You didn't see him the next morning? No, sir. I went right to bed when I came from my work.

"You didn't see him the second day after that? I think I saw him that night at twelve o'clock, when I was eating my supper. I saw him then.

"What night was that? The second or third night after election."

What are the duties which the law devolves upon the clerks of an election? "Previous to votes being taken, the clerks of election shall take and subscribe the following oath: I, A B, do solemnly swear or affirm that I will perform the duties of clerk of the election, according to law and the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same." (Comp. Stats. fifth div. § 1015.) At the opening and before the closing of the polls, "one of the clerks, under the direction of the judges, shall make proclamation of the same." (Comp. Stats. fifth div. § 1017.)

"The clerks of the election shall enter the name of the elector and number in the poll-book." (Comp. Stats. fifth div. § 1017.)

"Upon the adjournment of the polls the clerk shall, in the presence of the judges, compare their respective poll lists, compute and set down the number of votes, and correct all mistakes that may be discovered, according to the decision of the board,

until such poll lists shall be made in all respects to correspond." (Comp. Stats. fifth div. § 1024.) "The ballots and the poll lists agreeing, or being made to agree, the board shall then proceed to count and ascertain the number of votes cast, and the clerks shall set down in their poll-books the names of every person voted for, and, at full length, the office for which such person received such votes, and the number he did receive, the number being expressed at full length, such entry to be made, as near as circumstances will admit, in the following form:

Certified by us.

Attest:

B }
and } Clerks of election.
C D }

M N }
O P } Judges of election."
Q R }

(Comp. Stats. fifth div. § 1030.)

"The judges of election shall then enclose and seal one of the poll-books, under cover, directed to the clerk of the board of county commissioners of the county in which such election was held, and the packet thus sealed shall within three days from the closing of the polls be conveyed by one of the judges or clerks of election, to be determined by lot, to the postoffice nearest the house in which said election for such precinct was held, and register and mail the same to the clerk of the board of county commissioners." (Comp. Stats. fifth div. § 1031.)

All the statutory provisions requiring the services of the clerks of the election at precinct 34 were deliberately violated by the three judges. The clerks were selected with the understanding that they did not possess the necessary qualifications, and that they should not perform their lawful duties. The poll-book, which is mentioned in the last section, was delivered personally by Pennycook to the county clerk. There is no evidence to prove the time when the poll-books and returns were prepared, but Anderson did not affix his signature until the unusual hour of midnight upon the second or third day after the election, and the name of his co-clerk, Keefe, was not visible. In the mean time Pennycook had visited Butte and returned, and it is needless to say that it was generally known then from the news of the election which had been received that the vote of precinct 34 might turn the scale in the county of Silver Bow and the State. He was compelled to make another

trip to Butte and carried the poll-book, which for some inexplicable reason had not been put in proper form as promptly as the law demands.

"As soon as the polls of the election shall be finally closed, the judges shall immediately proceed to canvass the vote given at such election, and the canvass shall be public, and shall continue until completed." (Comp. Stats. fifth div. § 1027.)

John Wilson testified that he and Charles Omo were in this polling place about 7:30 o'clock, P. M.

"Did somebody put him (Omo) out? He was told to go out.

"By whom? By Pennycook.

"What else did he say to him? I don't know as I heard him say anything, except that he had no business there, he said.

"What did Omo say? He stepped out."

Charles Omo testified:—

"What else did you see him (Pennycook) do while you were there? He stopped very shortly when I stepped in, and says, 'What can I do for you?' I said isn't there anything in here to drink or smoke? 'No,' he says, 'there is nobody allowed in here, and the polls are closed; please step out.' I said I supposed this was a public place. He said, 'Not at present; please step out.' I did not move, and he jumped up and came over to where I was and said, 'Please step out.'

"What did you do when they told you to go out? Looked around and then stepped over to the door, and Pennycook took me by the shoulder, and said, 'Please step out,' and I said, 'All right,' and walked out, and he shut the door behind us.

"Who told you that this was not a public place? Pennycook.

"Did these gentlemen say anything to you about it? Morrison said the best thing you can do is to go out and attend to your business."

Thomas McCann testified that he voted "the straight Democratic ticket, except two men."

"Were you there after the polls closed? I was.

"Did you go into the polls after they were closed? No, sir.

"Why did you not? I could not get in.

"Did you try to get in? Yes, sir.

"Why couldn't you get in? The judges wouldn't let me.

"Did you notice anything peculiar about this place? Nothing, only the door was locked.

"Did you try it? Yes, sir.

"Do you know who was inside? Pennycook and Morrison; that was all I saw.

"How did you see him? I saw Pennycook open the door once or twice.

"What did you say to the persons inside when you tried to get in and found the door locked? I told them that I thought anybody could go in there that wanted to.

"What did they reply? That they could not.

"You were there until half past nine? Yes, sir, about that time; I went to bed between half past nine and ten.

"Were they (Pennycook and Morrison) in there all that time? Yes, sir."

Dennis O'Neil testified that he was "electioneering" at this precinct, and "voted for the Democratic candidates."

"You say that you went up to the polling place after the polls were closed, and that the only reason that no person was allowed in there was what Pennycook told you that they were drunk? Yes, sir.

"Do you know that the other men who went there and asked for drink were drunk? No, sir.

"You don't? I know that they was not.

"You know that men went there and asked for admission who were not drunk? Yes, sir."

From this and other evidence which is contained in a voluminous record, and cannot be quoted at length, it is proved that O'Reagan, one of the judges of the election, did not discharge his grave public task after the polls were closed. Pennycook and Morrison conducted privately the canvass, and excluded all persons from a privilege secured by the statute. The testimony does not prove that one citizen ever saw a ballot produced from the box of this precinct, or heard it read or tallied. There was no public canvass. The record does not disclose any reason for the assumption by Pennycook and Morrison of the labor and responsibility, which should have been shared by five judges and two clerks of the election.

The certificate of the returns is irregular.

"Certified by us, this second day of October, A. D. 1889.

Attest:

Thomas O'Keefe,	{ Clerks of election.	W. A. Pennycook,	{ Judges of election."
A. N. Anderson,		John Morrison,	
		William O'Reagan,	

The statute *supra* requires the clerks to certify and the judges to attest the number of votes received by each person.

Second—We will now comment upon the anomalous features of the returns of precinct 34. The statute provides that the name of every elector shall be pronounced "with an audible voice" by the judges to whom his ticket may be delivered before the same shall be put in the box, and "the clerk of the election shall enter the name of the elector and number in the poll-book." The voters of the precinct were numbered consecutively from 1 to 174, and the poll-book shows that they cast their ballots in the following remarkable order: The three judges, the two clerks, and the remainder in alphabetical array, according to the capital letter, from John A. Anderson to Robert Youngberg. This is the list:—

No.		No.	
1.	W. A. Pennycook,	19.	Wm. Broes,
2.	John Morrison,	20.	John Boucher,
3.	Wm. O'Reagan,	21.	Noble Britton,
4.	Thos. O'Keefe,	22.	A. Brooks,
5.	A. N. Anderson,	23.	J. J. Brandt,
6.	John A. Anderson,	24.	Wm. Bruns,
7.	S. Alsworth,	25.	R. Brystrom,
8.	Hen. Anderson,	26.	B. A. Borjesson,
9.	Axel Anderson,	27.	Frank Curry,
10.	H. Abraham,	28.	N. Cannavan,
11.	N. E. Album,	29.	F. H. Cirdland,
12.	Swan Anderson,	30.	N. Cowley,
13.	James Bush,	31.	C. Campbell,
14.	C. Baandet,	32.	J. Clark,
15.	Wm. Beattie,	33.	Tom Cavanaugh,
16.	John Berggsen,	34.	Chris Carolin,
17.	Frank Brady,	35.	P. Cuisere,
18.	H. Broderick,	36.	J. Cosgrave,

No.
37. C. Cassidy,
38. D. Doccico,
39. G. Doccico,
40. N. Doherty,
41. John Durkin,
42. C. A. Dahlgreen,
43. John Delavan,
44. Joe Davis,
45. Jas. Douglas,
46. Martin Deecy,
47. Thos. Dunn,
48. M. Dougherty,
49. R. Eagleson,
50. Jas. English,
51. O. N. Erickson,
52. L. N. Fish,
53. Mike Flaherty,
54. Chas. Fenton,
55. T. F. Gibbons,
56. Jas. P. Gallagher,
57. Tom Gallagher,
58. Wm. Grant,
59. A. Gillis,
60. E. Grenlund,
61. Wm. Goodwin,
62. John Gustafson,
63. O. Gilhooly,
64. A. Green,
65. Thos. Herson,
66. Mat Hoynes,
67. Pat Hannigan,
68. A. Henderson,
69. D. Hogan,
70. Chas. Holstrom,
71. T. Hendrickson,
72. M. F. Hogan,
73. Wm. Huldberg,
74. Ole Hanson,
75. Matt Isaacson,

No.
76. C. Johnasson,
77. A. Jensen,
78. J. F. Johnson,
79. A. Johnson,
80. Ole Johnson,
81. Sam Johnson,
82. Chas. Johnson,
83. Frank Johnson,
84. R. Keopke,
85. N. Knutson,
86. J. N. Kelly,
87. S. Kehren,
88. John Kaskela,
89. Nels Kukkola,
90. M. Kearney,
91. M. F. Keefe,
92. Robt. Kelly,
93. Ed Leary,
94. Fred Levett,
95. Ed Lang,
96. D. J. Lynch,
97. A. Linden,
98. N. Linden,
99. A. Locke,
100. Jere Larkin,
101. Jan Linfras,
102. C. Lindgren,
103. E. Larson,
104. C. Lindergreen,
105. C. Larsen,
106. Otto Leyer,
107. Wm. Maher,
108. Jas. Mulligan,
109. John Moriarity,
110. J. Moran,
111. P. W. Murphy,
112. J. P. Murphy,
113. N. Morfin,
114. R. Mooney,

No.		No.	
115.	J. Murey,	145.	Jos. Preston,
116.	L. K. Moore,	146.	J. F. Pogson,
117.	J. P. McDonald	147.	C. F. Peterson,
118.	John McLeod,	148.	John Petterson,
119.	B. McHugh,	149.	A. Rod,
120.	John McAvoy,	150.	John Reynolds,
121.	J. McFadden,	151.	A. Richter,
122.	D. McCarthy,	152.	Jas. Ryan,
123.	J. W. McPike,	153.	Geo. Ramberg,
124.	Thos. McCann,	154.	J. Rourke,
125.	Chris Nelson,	155.	Ole Rosenson,
126.	Oscar Neinie,	156.	Owen Slavin,
127.	M. Neylan,	157.	H. Smith,
128.	Ole Nelson,	158.	J. Stanger,
129.	C. Noegan,	159.	Chas. Swanson,
130.	Thos. O'Reilly,	160.	Jas. Steele,
131.	D. O'Leary,	161.	L. Subat,
132.	A. Olsen,	162.	John Smith,
133.	O. Olsen,	163.	L. Studness,
134.	D. O'Neil,	164.	C. Stream,
135.	E. M. Olander,	165.	Wm. Sass,
136.	G. Pennell,	166.	R. Thompson,
137.	Ed Pauley,	167.	Ed Wesner,
138.	John Peterson,	168.	R. Williams,
139.	John Pecsenuye,	169.	Jas. Whalen,
140.	Frank E. Price,	170.	E. Williams,
141.	Chas. Pidgeon,	171.	J. Waline,
142.	John Pierson,	172.	Pat White,
143.	R. Pollock,	173.	John West,
144.	A. Pederson,	174.	Robt. Youngberg.

The official ballot at the precinct contained the names of eighty-two candidates for State, county, and township officers, to wit: Member of Congress, governor, lieutenant-governor, secretary of State, attorney-general, treasurer, auditor, superintendent of public instruction, clerk of Supreme Court, chief justice, two associate justices, district judge, county clerk, sheriff, senator, ten representatives, three county commissioners, clerk of court, treasurer, county superintendent of schools, surveyor,

assessor, coroner, public administrator, attorney, two justices of the peace, and two constables. The Republican and Democratic parties had respectively made nominations for these positions; and the constitution was submitted for approval. Each of these alleged voters exercised fully his right of suffrage according to the returns which embody the figures.

21	Democrats had	171	votes, making	3,591	votes.
3	“ including constitution	172	“ “	516	“
1	“ “ “	173	“ “	173	“
14	“ “ “	170	“ “	2,380	“
1	“ “ “	169	“ “	169	“
1	“ “ “	168	“ “	168	“
1	“ “ “	165	“ “	165	“

Total.....7,162 votes.					
20	Republicans had	3	votes, making	60	votes.
5	“ including constitution	2	“ “	10	“
1	“ “ “	1	“ “	1	“
10	“ “ “	4	“ “	40	“
4	“ “ “	5	“ “	20	“
1	“ “ “	9	“ “	9	“
1	“ “ “	6	“ “	6	“

Total.....	146	votes.
.....	7,162	“

Grand total.....7,308 votes.

One hundred and seventy-four voters had 42 votes to cast, 7,308 votes.

Such mathematical exactness upon the part of so many voters is unprecedented. When we remember that the Australian system prevailed, and that a mark was placed opposite the name of each candidate, and that a large number of these persons had recently obtained the right to vote through declarations of their intention to become citizens of the United States, the result seems to be wonderful. At the same time the proposition for the issuance of bonds in the sum of twenty-five thousand dollars for school purposes excited a slight interest, and only ninety-one voters expressed their wishes thereon.

We will illustrate these views by a reference to the vote of

the other precincts of the county of Silver Bow and the State, upon the adoption of the constitution and the choice of a member of Congress.

Vote of Silver Bow County in 1889 for congressmen and constitution:—

No.	Precinct.	Carter, Rep.	Maginnis, Dem.	Constitution.		Total Constitution.	Total Congress.
				for	against		
1.	Walkerville	289	208	253	35	288	447
2.	"	107	108	126	21	147	215
3.	Centerville	179	101	151	21	172	280
4.	"	236	407	371	24	395	643
5.	Butte	183	107	139	14	153	290
6.	"	135	230	236	14	250	365
7.	"	159	142	190	14	204	301
8.	"	78	126	131	17	148	204
9.	"	200	219	277	24	301	419
10.	"	156	234	241	26	267	399
11.	"	133	104	125	21	146	237
12.	"	244	241	260	22	282	485
13.	"	198	184	233	30	263	382
14.	"	110	97	88	16	104	207
15.	Parrott	208	170	199	65	264	378
16.	Meaderville	209	65	162	12	174	273
17.	"	124	61	75	9	84	185
18.	South Butte	160	167	203	25	228	327
19.	Black Tail	35	28	13	2	15	63
20.	Centennial Brewery	90	77	88	18	106	167
21.	Rocker	91	30	53	4	57	121
22.	Burlington	142	63	77	11	88	205
23.	Silver Bow	16	18	18	3	21	34
24.	" " Junction	14	21	15	5	20	35
25.	McCune's Wood Camp	25	161	142	7	149	186
26.	German Gulch	2	12	8		8	14
27.	Norton Gulch	18	5	2		2	23
28.	Feeley	8	19	13	1	14	27
29.	Divide	18	12	22	3	25	30
30.	Melrose	34	28	38	2	40	62
31.	Soap Gulch	8	2	6	1	7	10
32.	Clipper Nine	6	5	7		7	11
Total		3,566	3,456	3,962	467	4,429	7,022

No polls were opened at precinct No. 25.

The following was the result in the State:—

Carter, 19,922 votes; Maginnis, 18,264 votes; total for congressman, 38,186 votes; for the constitution, 24,676 votes; against the constitution, 2,274 votes; total upon the constitution, 26,950 votes, leaving a difference of 11,236 votes. Although the percentage of non-voters upon the submission of the constitution, when compared with the votes recorded for the congressional candidates, is high and substantially the same throughout Montana, in precinct 34 the rule does not operate, and every elector voted according to the face of the returns. Even in

precincts 32 and 33 where only 10 and 11 votes respectively were polled, this average is unchanged. The number of voters in the county at this election is shown by another table to have been 7,329.

When we consult the returns of these precincts for the candidates for the offices which we have mentioned, it will be seen that there is a great difference between the possible and the actual vote. The number of citizens who failed to signify their choice in some respects is so regular, that the average can be applied generally.

Vote of Silver Bow County in 1889 for officers:—

Precinct No.	Voters.	Possible Vote.	Actual Vote.	Difference.
1	447	18 827	17,860	467
2	221	9,061	8,242	819
3	296	12,136	10,418	1,718
4	661	27,101	25,115	1,986
5	298	12,218	11,304	914
6	388	15,908	14,883	1,025
7	315	12,915	12,992	823
8	207	8,487	8,224	263
9	432	17,712	16,597	1,115
10	415	17,015	15,590	1,425
11	244	10,004	9,345	659
12	515	21,115	18 686	2,429
13	394	16,154	15,009	1,145
14	228	9,143	7,949	1,194
15	392	16,072	14,879	1,193
16	307	12,537	10,890	1,089
17	199	8,159	7,081	1,078
18	341	13,931	12,540	1,441
19	65	2,665	2,292	373
20	176	7,216	6,408	808
21	124	5,084	4,590	554
22	221	9,061	8,042	1,019
23	37	1,517	1,385	132
24	38	1,476	1,332	144
25	No	election	held.	
26	190	7,790	7,217	573
27	15	615	520	95
28	28	1,148	835	313
29	27	1,080	936	144
30	31	1,240	2,319	208
31	63	2,520	1,032	201
32	10	410	393	17
33	11	451	433	18
Total	7,329	300,368	276,386	23,982

Another peculiarity of this vote, which, however commends it to our favor, is the triumph which the supporters of the constitution achieved. It is the greatest majority that has been reported in any precinct of similar numbers, being 172 votes for and 2 votes against it.

While this question was not debated during the campaign from

a partisan standpoint, the votes thereon were apportioned in the same manner as if they had been for the Democrats and against the Republicans. The county of Silver Bow without precinct 34 was Republican, and the insignificant part of the ballots that was returned for its candidates under these conditions must be noted as strange and without an exemplar in Montana.

Third—We will review the testimony proving that actual fraud was perpetrated at precinct 34.

Before the record is examined it should be observed that most of the persons, whose names are registered upon the poll-book of the precinct, were employed at the time of the election in building a railroad near that point, and vanished when the work was finished. It was therefore difficult to produce them upon the trial as witnesses, and the number who testified was 10 out of 174 voters. The appellant offered in evidence two subpoenas with their returns duly verified showing the names of the voters at precinct 34 who could not be found, to establish diligence upon his part to procure their attendance. The objection of the respondent to their introduction upon the grounds that they were irrelevant and immaterial was sustained by the court. The statute, *supra*, provides that "each party shall be entitled to subpoenas, and subpoenas *duces tecum*, as in ordinary cases in law."

We affirmed the ruling of the court in *Heyfron v. Mahoney*, *supra*, that these papers should be admitted for this purpose.

In *Blue v. Peter*, 40 Kan. 717, the court said: "In addition there were subpoenas issued for about ninety of those claimed by Peter to be fictitious voters, and the return of the officer shows they were not found in Harper Township. . . . The failure to find the residence of so large a number of purported voters is more than suggestive, and to our minds a very strong proof of fraudulent voting." The effect of this error upon the rights of the parties will not be further considered, but the circumstances afford a satisfactory explanation of the failure of the contestant to bring into court all the voters of the precinct.

Charles Johnson testified that he was a registered voter of precinct 34, and that he did not vote at this election. His name is upon the poll-book as one who then and there voted, and is numbered 82.

Five voters, Axel Anderson, Charles Lindgreen, John A.

Anderson, A. Green, and John Petterson, did not vote upon the constitution. Axel Anderson testified:—

“Did you vote for the constitution or against it? I didn’t vote at all for that.”

Charles Lindgreen, testifying through an interpreter, answered:—

“Did he vote for the constitution or against it? He did not.”

John A. Anderson testified:—

“Did you vote for the constitution or against it? No, sir, I left that blank.”

He also swore that he marked the ballots for A. Green and John Petterson.

“Did you mark the constitution on either of them? No, sir.”

G. Pennell testified:—

“And you did not vote at all for Carter and Maginnis? For neither.”

C. Lindgreen testified:—

“Who did he vote for? Martin Maginnis and two Republicans.

“Did he vote for the balance of the Democrats besides the Republicans? No, sir.

“Did he only vote for three persons on the ticket? Only three.”

G. Pennell testified that he marked his ballot for “all of the Republican candidates except four,” and three Democrats, Toole, Bickford, and Caplice.

Axel Anderson testified that he “voted the Republican ticket,” excepting a Democrat, who “was one of the last ones on the ticket.” John A. Anderson, A. Green, and John Petterson voted “for the straight Republican ticket.”

The time when the witnesses deposited their ballots is generally given in their testimony and can be stated as follows: Michael F. Hogan, eight o’clock; John Morrison, quarter past eight o’clock; C. Lindgreen, ten o’clock; D. O’Neil, half past ten o’clock; Axel Anderson, one or two o’clock; G. Pennell, three to four o’clock; and John A. Anderson, A. Green, and John Petterson voted together, but the hour is not revealed.

Axel Anderson testified that he left his ticket with Pennycook, who held it in his hand, as he went out, and also said:—

“Do you undertake to say that that ticket was marked or stamped by Pennycook after you handed it to him, or before? After.

“Are you sure of that? Yes, sir.”

C. Lindgreen testified:—

“After he had marked his ballot, what did he do with it? He gave it to Pennycook.

“What did Pennycook do with it? He put a mark on it and put it in the ballot-box.

“What kind of a mark did he put on it? He had something like that (the official stamp).”

Charles Omo, the witness above named, further testified that he and Charles Wilson went into the voting place after the polls were closed and saw Pennycook and Morrison there.

“What were they doing when you went in? This Pennycook was doing some kind of stamping work there.

“What with? With a stamp.

“Was it anything like that (the official stamp) on the table? Yes, sir, something similar.

“What was he stamping? Ballots.

“What kind of looking papers were they, for size and color, etc? About six or eight inches in width, and twenty or twenty-four in length.

“What else did you see him do while you were there. (Then follows the answer which is given *ante*, p. 596.)

“When he jumped up did you see anything else? The only thing that I noticed was a bunch of papers that he had been sitting on.

“What were the papers? I could not say; I took them to be ballots; they fell on the floor as he jumped up off the chair.”

On cross-examination, this witness answered:—

“How many times did this gentleman stamp these papers? Once only.

“Positive? Yes, sir.”

John Wilson, the above-named witness, corroborated the testimony of Omo, and, in reply to questions by the court, said:—

"How many did he stamp? He must have stamped probably two.

"In how long a time? Just a short bit, probably a minute.

"Was that all he stamped while you were in there? That was all I noticed.

"Were you in there longer than the time he occupied in stamping two papers? I don't think I was.

"Did he have anything else there except papers? He might have had a pencil.

"Did you see any books or check lists there? No, sir; I didn't take notice to it.

"Did you see what impress this stamp left on the paper? No, sir.

"Where was Omo at this time? He was in there."

The foregoing testimony was not contradicted by any person, and no effort was made by the respondent to impeach one of the witnesses. Pennycook and Morrison, who must possess the best evidence upon all the issues concerning the vote of precinct 34, were not put upon the stand. Through the remarks of counsel in the argument we learn that Pennycook, during the trial, was in Scotland and Morrison was in Colorado. This case, in some of its phases, has invaded the Senate chamber, and been expanded to national proportions, and the materiality of their testimony can be readily understood. But the subpoena of the appellant could not command Pennycook and Morrison to appear before the court and tell the truth.

When, therefore, the evidence which was produced is weighed, these facts are established: Some person voted in the name of Charles Johnson during his absence. All the electors of the precinct did not vote for or against the constitution. Pennell did not vote for either candidate for Congress. Lindgreen marked only three out of eighty-two candidates upon the ballot. Three voters cast "the straight Republican ticket." Axel Anderson marked all the Republican candidates except one, probably a constable, and Pennell voted for three Democrats and thirty-seven Republicans. Pennycook marked illegally some ballots after their delivery to him to be deposited in the box. The voters did not march to the polls in alphabetical array, and the poll-book does not disclose the number or order of those who

voted. Pennycook and Morrison stamped ballots after the polls were closed, and Pennycook had a package under him when Wilson and Omo were present and required to leave the polling place. The returns of precinct 34 are fraudulent, and do not state truly the vote which each candidate for office received at the last election. And voters who had a right to be present when the votes were counted, were ejected from the polling place by the judges when they were stamping ballots after the closing of the polls.

Fourth — We will apply to the facts the principles of the law, which are laid down by the authorities.

The extraordinary length of this opinion restrains us from collecting the cases which throw light upon this subject, and we shall rely upon the doctrines which are stated in the text-books. It is admitted by all that the statutes regulating elections are designed to protect the precious right of suffrage by securing an impartial count of the ballots, and the choice of the people for public trusts. The duties of the clerks of an election are as essential and as distinctly defined as those of the judges, so that they can be checks upon each other, and vindicate the purity of the ballot-box. While many of the statutory requirements are directory, and the form is always subordinate to the substance, they are nevertheless considered by the legislative department safeguards of the voter in the exercise of this privilege of citizenship. They have been violated with impunity by the officers of precinct 34, with the purpose of defeating the will of the people. Waiving the point that the returns are not properly certified, what legal weight attaches to them?

Mr. Paine says, in his work on Elections: "Poll-books duly certified and returned are *prima facie* evidence of the truth of their contents; but the presumption so raised may be rebutted, by proof that they are fraudulent and fictitious to such an extent as to render them wholly unreliable." (§ 592.) Mr. Mechem writes in his treatise on Public Officers: "It is presumed that the officers of election have done their duty, and that the returns made by them are a full and fair statement of the true result, and this presumption is to be given effect until they are shown to be unreliable." (§ 227.) Mr. McCrary, in his treatise on Elections, says: "The return must stand until such facts are

proven as to clearly show that it is not true. When shown to be fraudulent or false, it must fall to the ground." (§ 536.) "If an officer of the election is detected in a wilful and deliberate fraud upon the ballot-box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not, of itself, sufficient to affect the result. The reason of the rule is, that an officer who betrays his trust in one instance is shown to be capable of the infamy of defrauding the electors, and his certificate is therefore good for nothing. . . . We repeat, therefore, the opinion expressed in a former chapter, that a wilful and deliberate fraud on the part of such an officer, being clearly proven, should destroy all confidence in his official acts, irrespective of the question whether the fraud discovered is of itself sufficient to change the result." (§ 539.)

The nature of the proof to establish fraud is accurately defined in *Wheat v. Ragsdale*, 27 Ind. 206, and Mr. Justice Elliott for the court says: "Direct and positive proof of the alleged fraud would in such a case be more satisfactory to the court or jury trying the case. Such frauds, however, are seldom committed in the presence of those who are not participants in them, and if only direct and positive evidence were admissible, few, if any, of them would be brought to light. We are not aware of any reason why frauds upon the ballot-box, and thereby upon candidates for the offices to be filled, may not as well be established by circumstantial evidence as frauds of any other character." In the American and English Encyclopædia of Law the rule is stated as follows: "While fraud is not to be presumed, it is equally true in election as in other cases, that it is usually proved by circumstantial evidence. It would be very difficult, and generally impossible, to prove an agreement between the parties who committed the fraud; and if no circumstantial evidence was recognized as sufficient, the frauds would generally go unrebuked." (Vol. 6, p. 354.)

In *Littlefield v. Green*, Brightly's Leading Cases on Elections, 494, the court observes: "The names of the first 668 voters, as appears from the poll-books, appear to have been registered and voted in alphabetical and numerical order. . . . One of them (the officers who conducted the election) swears that he cannot account for the names appearing in alphabetical order on the poll-books

from A to Z and Z to A, but thinks that men voted in that order, a thing impossible and incredible." When, where, and by whom were the poll-books and returns of precinct 34 made? The transcript may be searched in vain for any answer to these important inquiries. No witness ever saw the name of one voter recorded in the poll-book.

In *Knox County v. Davis*, 63 Ill. 417, the court views, as a circumstance tending to prove fraud on the part of the officers of an election, their conduct, and says: "Again, the moderator of the election has absented himself, or absconded since the proceeding was instituted, so that his evidence could not be had." In *Russell v. McDowell*, 83 Cal. 70, which was an election contest affecting the office of sheriff, the Supreme Court of California referred to similar conduct, and Mr. Chief Justice Beatty said: "Officers of election are like all other persons, presumed to know the law, and their deliberate omission to follow directions designed to prevent fraudulent voting, certainly calls for explanation. It casts suspicion upon their integrity, and is sufficient *prima facie* to make out a case of fraud. No doubt such omission is susceptible of explanation, and we are very willing to believe that the officers of these precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But, as the case is presented, we cannot indulge that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not with fraudulent purpose; and, in the absence of any rebutting proof on this point, we feel constrained to hold that the contestant made out a case of malconduct on the part of the election boards. . . . Here no proof in rebuttal was offered, and the evidence for contestant stands absolutely uncontradicted." These authorities are directly in point, and we hold that the commission of fraud at the election in precinct 34 has been shown by both direct and circumstantial evidence.

What is the remedy? If possible, the poll should be purged, and the legal vote should not be suppressed by reason of the malconduct of the officers of the election. The absence of the citizens of the precinct is an obstacle which cannot be overcome. How can the legitimate ballots be ascertained? If we reject the returns, we can reasonably presume that the vote of precinct

34 upon the constitution was in the same ratio as the remainder of the county of Silver Bow. A calculation upon this basis demonstrates that this vote should have been 112, and that Pennycook and Morrison may have tampered with 62 ballots. The constitution was not endangered, and there was no urgent demand for the counting of the whole vote of precinct 34 upon the question, but, in the preparation of the overwhelming majorities for certain candidates upon the ballots from governor to constable, policy probably dictated that there should be no exception. There should also have been a difference between the possible and actual vote of this precinct of 584 votes or thereabouts, but, contrary to the rule which prevailed in every polling place of the county, none is returned. This is not the mode of settling the contest, and we must seek relief elsewhere. Upon whom rests the burden of proof under these circumstances?

Paine writes, in his work on Elections: "When a poll-book is so impeached, the burden of proving legal votes by other proof is thrown upon the party claiming them." (§ 592.) "When the proceedings are so tarnished by fraudulent, negligent, or improper conduct on the part of the officers, that the result of the election is rendered unreliable, the entire returns will be rejected, and the parties left to make such proof as they may of the votes legally cast for them." (§ 596.) In *Phelps v. Schroder*, 26 Ohio St. 558, the court held: "Where a poll-book is impeached for fraud, and rejected as *prima facie* evidence, it does not follow that the legal voters who had voted at the election will be disfranchised, or that the candidates will be deprived of the legal votes they actually received at the election in the township. . . . When the poll-book was rejected, the way was opened for either party by testimony other than the poll-book, and in addition to it, to have proved the number of legal votes he received in the township. . . . Of course, the burden of proof would have been on the party claiming the legal votes." The last sentence of section 539, *supra*, McCrary on Elections, is the following: "The party taking anything by an election conducted by such an officer must prove his vote by evidence other than the return." In American and English Encyclopædia of Law, page 353, it is written: "Fraud destroys the value of returns as evidence. The fraud does not invalidate

the legal votes cast, but, by destroying the presumption of the correctness of the returns, it makes it necessary that any person who claims any benefit from the votes shall prove them; and where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined, the return of the precinct will be rejected." The findings of the court show that the majority for Lloyd in the remaining precincts of the county of Silver Bow was 127. Under the authorities Sullivan would be compelled to prove that he received, at least, 150 of the 174 votes in precinct 34 (assuming that the last number represents the legal voters), in order to obtain any majority. No evidence of this description was offered by the respondent.

Some of the citations refer to the legal necessity for rejecting the vote of a precinct under the facts appearing in the record, and all the authorities lead to this conclusion. In American and English Encyclopædia of Law, page 334, we read: "But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, where they are matters of substance, and render the result uncertain, and where they are fraudulent, and the result is rendered uncertain thereby, the returns should be set aside, and the persons required to prove the legal votes cast for them. Where the incompetency, inefficiency, and reckless disregard of the essential requirements of the law prevail to such an extent that the acts of the officers must be deemed unreliable, this will, of necessity, have the same effect as fraudulent action, and be ground for rejecting the returns." Says Mr. McCrary, in his work on Elections: "While a mere irregularity which does not affect the result will not vitiate the return, yet where the provisions of the election law have been entirely disregarded by the officers, and their conduct has been such as to render their returns utterly unworthy of credit, the returns must be rejected. In such a case the returns prove nothing." (§ 476, 3d ed.)

We therefore conclude that the findings of the court below, regarding the legal effect of the election held upon the first day of October, 1889, at precinct 34, are contrary to the evidence and should be set aside. The returns thereof do not show the true result of the votes which were cast for the candidates, including the contestants for the office of sheriff. The officers

did not canvass, count, and make said returns. The election was conducted in violation of the laws regulating the same, and the opportunity was afforded for the perpetration of crimes against the suffrages of the people. Ballots were illegally marked after they had been delivered to the judges to be put in the box. The official stamp was unlawfully placed upon ballots by one of the judges after the polls were closed. Fraud was committed by the officers of the election to such an extent that the actual vote of the precinct cannot be ascertained, and the returns are valueless as evidence and must be rejected.

When these findings are discarded, the official vote of the board of canvassers of the county remains unaltered, and Lloyd should have been declared the person who was duly elected to said office.

It is therefore ordered and adjudged that the judgment be reversed with costs, and that the case be remanded to the court below, with instructions to enter a judgment that John E. Lloyd was duly elected sheriff of the county of Silver Bow aforesaid, for the term beginning with the date of the admission of the State of Montana into the Union, and ending on the first Monday in January, 1893, and make the necessary orders to carry into effect this judgment.

HARWOOD, J., and DE WITT, J., concur.

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1. On the trial of an action between two claimants of a mining claim upon the lands of the United States, a motion for a nonsuit was made by the defendant upon the ground that the plaintiff deraigned title through one M., an alien. The defendant's answer alleged the citizenship of M., which was admitted by plaintiff. *Held*, that the defendant was bound by his answer, and the nonsuit was properly denied. — *Wulf v. Manuel*, 279.
2. The defendant at the time of his purchase of the mining claim in controversy, and at the time of his application to the United States for a patent, was an alien, but was made a citizen on the day of the trial. *Held*, that under the law only citizens of the United States, and those who have declared their intentions to become such, can apply to purchase the mineral lands of the government, and that as such lands are not open to exploration, occupation, or purchase by aliens, the defendant's act of naturalization could not retroact to his purchase or possessory right to a mining claim upon the public domain. — *Id.*

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See PRACTICE, 2; JUDGMENTS, 3.

1. The refusal of the court below to allow the answer to be amended in order to admit proof of constructive fraud cannot be held error, where it does not appear from the transcript that any amendments were ever prepared or submitted to the court, or that good cause was shown therefor. — *Bickle v. Irvine*, 251.
2. It is not error for the court to allow an amendment to a pleading after the evidence is in, in order that the allegations may correspond with the proofs adduced, where such amendment does not change the nature of the action or mislead the adverse party to his prejudice. — *Williston v. Camp*, 88.

ANNUAL REPORT.

See CORPORATIONS, 1, 2.

ANSWER.

See EJECTMENT, 2; PLEADING, 2, 3, 7, 8, 9.

APPEAL.

See JUSTICE'S COURT, 1; ELECTIONS, 7.

1. *Held*, that on an appeal this court is not precluded from examining the original answer and the sustaining of the demurrer thereto, for the purpose of ascertaining whether the court below in such decision, together with his subsequent reversal of his ruling in the same case, did not deprive the defendant of a substantial right, and exclude him from his day in court. — *Newell v. Meyendorff*, 254.
2. Under section 826 of the Code of Civil Procedure, providing that "all appeals from Justices' Courts shall be tried anew in the District Court on the papers filed in the Justice's Court," a judgment by default will be affirmed, on appeal, where no motion was made in the Justice's Court to set aside the default, or other appropriate relief sought; the complaint being sufficient for the court in which it was originally filed. — *Gage v. Maryatt*, 265.
3. An order denying a motion for a new trial will not be considered on appeal when the statement has not been certified to by the trial judge as having been allowed. — *Steuffen v. Jefferis*, 66.
4. An order denying a motion for a new trial is an appealable order, and will not be considered on appeal where the notice fails to designate such order as the subject of review. — *Id.*
5. The Territory has the right of appeal from an order sustaining the plea of a former conviction, where there is no dispute as to the facts which are offered in support of the plea. — *Territory v. Stocker*, 6.
6. An objection on appeal that the verdict is contrary to the law and the evidence will not be considered where the record contains none of the evidence and the indictment is technically perfect. — *Territory v. Pendry*, 67.

APPEALABLE ORDERS.

See APPEAL, 4; PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 1.

1. An order which modifies, and thereby partially dissolves an injunction, is appealable, and may be reviewed upon the papers used on the hearing in the court below properly certified, and no bill of exceptions is necessary. — *Blue Bird Mining Company v. Murray*, 468.
2. An order denying a motion to set aside an order for an examination of a judgment debtor upon proceedings supplementary to execution is an appealable order. — *Barber v. Briscoe*, 341.

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APPROPRIATIONS.

See CONSTITUTIONAL LAW, 1; MANDAMUS, 1.

ASSIGNMENT.

Where partners made an assignment for the benefit of creditors, and afterwards executed a note in the firm name, which act was followed by a formal dissolution, *held*, that the assignment suspended but did not dissolve the copartnership, and the firm was liable upon the note. — *Williston v. Camp*, 88.

ASSUMPSIT.

Where the plaintiffs sue for work and labor done in drilling a well for defendants at their request, the complaint containing a *quantum meruit* count, it is error for the court to grant a motion for a nonsuit, upon the ground that "if there was any contract between these parties it was to sink a well containing other than surface water." — *Littrell v. Wilcox*, 97.

ATTACHMENTS.

See PLEADING, 456.

1. Under section 200 of the Code of Civil Procedure, which provides, in substance, that the defendant may "at any time before the time for answering expires apply on motion to the court that the attachment be dissolved, on the ground that the writ was improperly issued," the motion must be made within the time in which the defendant shall appear and answer the summons. — *Wallace v. Lewis*, 399.
2. Where a motion to discharge an attachment is overruled, without prejudice to the renewal of the motion, upon a change of venue being granted, and the venue is subsequently changed, the time in which such motion may be made is not thereby enlarged. — *Id.*
3. In the case at bar, before the expiration of the time to answer the defendants moved to discharge the attachment, which motion was denied without prejudice to a renewal of the motion on a change of venue. A change of venue being granted, the defendants, after the expiration of the time to answer, again moved to discharge the attachment, using the same papers that had been filed on the former motion. *Held*, that a motion, being an application for an order, is not made by the filing of an application in writing alone, but by the moving of the court to grant the order, and the defendants' second motion was too late. — *Id.*
4. Chapter 6, title 7 of the Code of Civil Procedure provides in substance that range stock may be attached between the first day of November and the next succeeding fifteenth day of May, by the filing of a copy of the process with the recorder of the county. The filing in the case at bar was made with the proper officer upon the fourteenth day of May, at 10:30 P. M. *Held*, that section 911, fifth division of the Compiled Statutes, providing that county offices shall be kept open during the business hours of each day, does not prohibit the transaction of official business at other times, and the service of the process was valid. — *Harmon v. Comstock Horse and Cattle Company*, 243.

ATTORNEY IN FACT.

See PLEADING, 2; ESTOPPEL, 1.

ATTORNEY AT LAW.

See SHERIFF, 3.

An attorney at law representing the mortgagees at a sheriff's sale has no implied power to authorize the sheriff to accept credit bids. (LIDDELL, J., dissenting.) — *Maddox v. Rader*, 126.

CLAIM AND DELIVERY.

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AUDITOR.**See MANDAMUS, 1, 3; CONSTITUTIONAL LAW, 2.****BILLS OF EXCEPTION.****See INJUNCTION, 1; APPEALABLE ORDERS, 1.****BONDS.****See OFFICIAL BONDS, 1, 2; SPECIFIC PERFORMANCE, 1.****BURDEN OF PROOF.****See PRACTICE, 8; ELECTIONS, 11.****BRIEFS.**

1. The failure of attorneys to file briefs on an appeal from a conviction of murder in the first degree, criticised and disapproved. — *Territory v. Roberts*, 12.
2. When no brief is filed by appellant calling attention to any error in the judgment roll, the court will presume that there is none. — *Steuffen v. Jefferis*, 66.

CANVASSING BOARD.**See CONSTITUTIONAL LAW, 11.****CAVEAT EMPTOR.****See WARRANTY, 2.****CERTIFICATE OF ELECTION.****See ELECTIONS, 8; CONSTITUTIONAL LAW, 11.****CERTIORARI.****See CONSTITUTIONAL LAW, 3.****CHALLENGE.****See GRAND JURY, 1; PRACTICE, CRIMINAL, 7.****CHARACTER.****See CRIMINAL LAW, 12.****CHATTEL MORTGAGE.****See SHERIFF, 1, 2, 3, 4.**

A failure to comply with the provision of section 1538, fifth division, Compiled Statutes, which requires a chattel mortgage to be accompanied with an affidavit of the parties thereto that such mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, renders such mortgage void as to a subsequent mortgagee, with actual knowledge that the debt attempted to be secured by the prior mortgage was a *bona fide* obligation, as such statute is in derogation of the common law and must be strictly construed. — *Milburn Manufacturing Company v. Johnson*, 537.

CLAIM AND DELIVERY.**See DAMAGES, 3.**

CLAIMS AGAINST THE STATE.

See MANDAMUS, 3; STATE CONTRACTS, 1.

COMMON CARRIERS.

See RAILROADS, 1, 2, 3; DAMAGES, 1.

COMMUNIS ERROR FACIT JUS.

See MAXIMS, 2, 3.

COMMUNITY PROPERTY.

A widow who has taken by virtue of the will more than one half of the whole estate cannot claim any part of the other half on the ground that the whole estate was community property, under section 551 of the Probate Practice Act, providing that upon the death of the husband one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband. — *Ohadwick v. Tatem*, 354.

CONCLUSION OF LAW.

See PLEADING, 8.

CONFLICT IN TESTIMONY.

See DAMAGES, 2.

CONSTITUTIONAL LAW.

See MANDAMUS, 1; RAILROADS, 1; ELECTIONS, 7.

1. Section 4, article vii. of the Constitution, provides that until otherwise provided by law, certain State officers enumerated, "shall quarterly, as due, during their continuance in office, receive for their services compensation, which is fixed as follows: Secretary of State, three thousand dollars per annum. . . . The compensation enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office, and the salary of no official shall be increased during his term of office. No officer named in this section shall receive, for the performance of any official duty, any fee for his own use." Section 51, article v., provides that: "Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election." Section 84, article v., provides that: "No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt." Section 1, article vii., provides that the State auditor and State treasurer "shall perform such duties as are prescribed in this constitution, and by the laws of the State." The State treasurer refused to pay a warrant drawn on him by the State auditor in favor of the relator for his quarterly salary as secretary of State, upon the ground that no appropriation had been made by law for the payment of any warrant issued to State officers for their services. *Held*, that the State treasurer was required to pay such warrant, as the provision of the constitution that certain enumerated officers shall receive the compensations specified therein is an appropriation made by law, and no legislative act is necessary. — *State ex rel. Rotvitt v. Hickman*, 370.

2. Section 463, third division, Compiled Statutes, creating a lien upon the real estate and mining claims of any person for the payment of any judgment for fine or costs, which may be imposed upon him for a criminal offense, such lien to take effect from the time of his arrest, is not unconstitutional, and does not encumber his property without due process of law. — *Silver Bow County v. Strumbaugh*, 81.
3. Section 376, first division, Compiled Statutes, provides for the inspection, examination, and survey of lode mining claims, upon an order of the District Court made upon the petition of any party having any right to or interest in such mining claim, where such examination or survey is necessary to protect such right or interest, upon notice to the adverse party in possession of such claim. *Held*, that the authority bestowed by this statute does not empower the District Court to grant an order that may be made unjust or oppressive, nor does it deprive the adverse party of his property without due process of law, and is therefore not unconstitutional, though it does not require the interest of the petitioner to be defined, and permits such examination before the commencement of any action by the parties and without bond, as such proceeding is the proper mode of securing the best evidence of which the case in its nature is susceptible, and though it does not provide for an appeal from such order, as the proceedings may be reviewed by the writ of *certiorari*. — *St. Louis Milling and Mining Company v. Montana Company*, 288.
4. Compiled Statutes of Montana, division 3, section 287, subdivision 11, providing that a juror, who has formed or expressed an opinion as to the guilt or innocence of the accused, is competent, if it appear that such opinion is founded upon reading newspaper statements, and the juror feels able, notwithstanding such opinion, to render an impartial verdict, is not repugnant to the Constitution of the United States, conferring the right of trial by an impartial jury. — *Territory v. Bryson*, 32.
5. Section 160, division 4, Compiled Statutes, prohibiting the sale of liquors to Indians, is an act within the police power of the territorial government, and is not inconsistent with the clause of the Constitution granting to Congress the power to regulate commerce with the Indian tribes, nor with the laws of the United States framed thereunder. — *Territory v. Guyoll*, 46.
6. A sale of whiskey in Montana outside of an Indian reservation to an Indian, belonging to a tribe living upon a reservation in charge of an Indian agent, is not commerce "with the Indian tribes" within the meaning of the Constitution of the United States, article i., section 8, subdivision 3. — *Id.*
7. Under the legislative power of Territories extended by section 1851, Revised Statutes of the United States, there is no limitation upon the authority of a Territory to pass laws for the regulation and restriction of "the sale of articles deemed injurious to the health or morals of the community." — *Id.*
8. Section 8, article iii. of the Constitution, provides as follows: ". . . . All criminal actions in the District Court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court." *Held*, that this clause of the Constitution did not execute itself, and before it could be carried into effect, the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the State and accused, must be defined by the legislative department. — *State v. Ah Jim*, 167.
9. Section 8, article iii. of the Constitution, provides as follows: ". . . . A grand jury shall consist of seven persons, of whom five must concur to find an indictment." *Held*, that this clause of the Constitution executes itself, and in the absence of further legislation, all offenses of the grade of felonies, or having their origin in the District Court, must be inquired into under the provisions of the Criminal Practice Act relative to indictments. — *Id.*

10. That the substantial rights of the accused would not be prejudiced by the submission of his case to the grand jury created by the Constitution, and that the above section of the Constitution was not *ex post facto*. — *Id.*
11. The act of Congress, approved February 2, 1889, enabling the people of Montana and other Territories to form and adopt State governments, provides in section 8 that: “. . . . At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitution. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same” Section 9 provides: “. . . . and until said State officers are elected and qualified under the provisions of each constitution, and the States, respectively, are admitted into the Union, the territorial officers shall continue to discharge the duties of their respective offices in each of said Territories.” Section 24 provides: “That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified, or changed by this act or by the constitutions of the States, respectively.” Section 25 provides: “That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed.” Section xx., “Schedule,” section 1, of the State constitution, provides that: “All laws enacted by the legislative assembly of the Territory of Montana, and in force at the time the State shall be admitted into the Union, and not inconsistent with this constitution or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the State until altered or repealed, or until they expire by their own limitation.” The fifth paragraph of ordinance II., referred to in section 17 of the “Schedule,” and adopted with the constitution, requires that the returns of said elections for the adoption or rejection of the constitution “shall be made to the secretary of the Territory, who, with the governor and the chief justice of the Territory, or any two of them, shall constitute a board of canvassers, who shall meet and canvass the votes so cast, and declare the result.” The eighth paragraph of the same ordinance provides that the votes for all State officers, members of the legislative assembly, and district judges, shall be returned and canvassed “in the same manner and by the same board as is the vote upon the constitution.” A statute of the Territory, existing prior to the enabling act and prior to the adoption of the constitution, provided that the canvass of the votes cast for members of the legislative assembly should be made by the boards of county commissioners of the respective counties in the Territory, and certificates of election issued by the clerk of the board of county commissioners. *Held*, that this statute was in conflict with the said act of Congress and the constitution of the State and did not remain in force after the adoption thereof. *Held, also*, that the board of canvassers provided for in the fifth paragraph of ordinance II. was the legally constituted canvassing board to canvass the votes for members of the legislative assembly and to declare the result. *Held, also*, that a certificate of election issued by said board of canvassers was *prima facie* evidence of relator’s membership in the House of Representatives of this State, — *State ex rel. Thompson v. Kenney*, 228.

CONTINUANCE.

See CRIMINAL LAW, 12.

CONTRACTS OF STATE.

See STATE CONTRACTS, 1.

CONTRACTS.

See PUBLIC POLICY, 1; SPECIFIC PERFORMANCE, 1.

1. Contracts made by public officers, as commissioners of a county, obtain validity only by force of the law authorizing their making, and persons contracting with such officers are charged with knowledge of their lawful power and the extent of their authority. — *Lebcher v. Commissioners of Custer County*, 315.
2. Sections 956, 958, 959, 960, and 962, fifth division of the Revised Statutes, provide in substance, that every poor person unable to earn a livelihood in consequence of bodily infirmities, idiocy, lunacy, or other cause, shall receive relief from the county, where there are no relatives financially able to maintain such pauper; that the county commissioners shall annually invite proposals and let contracts for the care, support, and maintenance of the sick, poor, and infirm, and that such persons shall cease to be a charge upon the county when reported by the county physician to be physically able to support and maintain themselves. A contract was let by the appellant for the care of the "poor" at a certain price *per capita*, and for the care of the "sick and infirm" at another price *per capita*. *Held*, that the contract was void, the only contract authorized by the law being one for the care of such persons as were poor and therewith sick and infirm. — *Id.*
3. A contract for the sale of cattle stipulated a fixed sum to be paid to the purchaser upon a failure of the owners to deliver the entire number of cattle called for therein, but did not require the purchaser to accept at any one time a less number. The owners delivered a less number, which was accepted by the purchaser. *Held*, that the sum stipulated in the contract was an agreement for liquidated damages, but by the acceptance of a part performance, was changed into an agreement in the nature of a penalty, under which only such damages could be recovered as resulted from a partial breach of the contract. — *Wilcox v. Grinnell Live Stock Company*, 154.

CONVEYANCES OF REALTY.

See ESTOPPEL, 1, 2.

1. In an action to have a deed declared a mortgage the answer specifically denied all of the material allegations of the complaint, and alleged an agreement that an indebtedness of the plaintiffs, and another and future indebtedness to be contracted by them, should become an additional claim against the interest of the plaintiffs in the premises conveyed by such deed, unless the terms and conditions of a certain bond, executed by the defendants to the plaintiffs for a reconveyance of the property, was complied with. Plaintiffs moved for judgment on the pleadings upon the ground that the agreement set forth in the answer was a confession that the transaction constituted a mortgage. *Held*, that the motion was properly denied, the question as to whether, in the intent of the parties, the transaction was a mortgage or a sale, being one to be decided by the evidence. — *Kleinschmidt v. Kleinschmidt*, 477.
2. A conveyance of realty for a consideration which is the full value of the property, where the vendees executed to the vendors a bond to reconvey such property, the papers showing an absolute conveyance, is, in the absence of evidence tending to show that a mortgage was intended, an absolute sale, with an independent privilege to repurchase upon a compliance with the terms of the bond. — *Id.*

CORPORATIONS.

See CONTRACTS, 1.

1. Section 460, chapter xxv., fifth division of the Compiled Statutes, making the trustees of a corporation, organized under the provision of said chapter, jointly and severally liable upon a failure to file an annual report for all debts of the

company then existing, and for all that shall be contracted before such report shall be made, though a penal statute and requiring a strict construction, cannot be so construed as to excuse such trustees from liability for debts contracted prior to a default. — *Gans v. Switzer*, 408.

2. In an action against the trustees of a corporation to charge them with individual liability for failure to file an annual report, it was alleged in defense that before the time for filing such report the corporation was insolvent and had entirely abandoned its business; that all its property belonged to one of its trustees, having been delivered to him in satisfaction of an indebtedness; and that for a period of two months no officer or trustee had exercised any corporate act or function, and that there was no intention to resume the business of said corporation. *Held*, that the acts set forth did not dissolve the corporation and constituted no defense to the action. — *Id.*
3. The laws of this State relating to corporations contemplate that the corporate existence of a corporation organized thereunder shall continue until disincorporated by order of the court, or dissolved by limitation, or until its franchise be forfeited for cause through judicial proceedings, and such corporations are not dissolved by abandonment or non-user of their franchises. — *Id.*
4. The failure of a foreign corporation to file a copy of its charter, or certificate of incorporation, with the secretary of the Territory, and in the recorder's office of the county wherein it intends to transact business, as required by section 442, fifth division, Compiled Statutes, does not deprive it of the right to sue in the courts of this Territory, where the cause of action is not based upon any act or contract of the corporation in the conduct of its business. — *Powder River Cattle Company v. Custer County*, 145.

COUNTER-CLAIM.

See PLEADING, 2; JUDGMENTS, 1.

COUNTIES.

See CONTRACTS, 1, 2; ACTION, 1.

COUNTY ATTORNEY.

See NOTARY PUBLIC, 3.

CRIMINAL LAW.

See EVIDENCE, CRIMINAL; PRACTICE, CRIMINAL; INDICTMENT, 1; GRAND JURY, 1, 2.

1. Under an indictment for robbery, it is error for the court to charge the jury, that "the possession of goods recently stolen, or of which a person was recently robbed, is a circumstance to be considered by the jury in determining as to the guilt or innocence of the defendant. The possession, when unexplained, or not satisfactorily accounted for, by a defendant, tends strongly to establish the guilt of a defendant found in possession of goods" as the question whether the possession tended strongly or lightly to show guilt was a matter for the jury to pass upon. — *State v. Sullivan*, 174.
2. Where the defendant testified that he bought the goods described in the indictment, the jury may legally discard the evidence without the introduction of proof in rebuttal of his alleged purchase of the property. — *Id.*
3. In an indictment for rape it is not necessary to allege that the female injured is not the wife of the defendant, as such negative matter is not an ingredient or constituent of the offense, but is in the nature of matter of defense. — *State v. Williams*, 179.

4. Where the statute does not make the costs part of the punishment for the crime of which a defendant is convicted, he cannot be imprisoned for the non-payment of costs in cases originally prosecuted in the District Court, but a judgment for such costs may be enforced as in civil actions. — *State v. Sullivan*, 490.
5. The defendant in the case at bar pleaded a former acquittal of the same offense on the ground of a variance between the proof and the indictment, in that the person injured was described in the indictment as John Moys, and the proof showed his true name to be John Maze. *Held*, that as the surnames were not alike in sound or in spelling, and the offense was not described with sufficient certainty in other respects to identify the act, the variance was material, and the former acquittal was therefore not a defense to the second prosecution. — *Id.*
6. The word "papers," in section 354, third division of the Compiled Statutes, providing that "a new trial shall be granted when the jury has received any evidence, papers, or documents, not authorized by the court," refers to such written instruments as might be competent testimony when inspected by the court and found to be competent under the rules of evidence, and does not include newspapers; and the reception by the jury of newspapers containing comments on the case does not in itself vitiate the verdict. — *State v. Jackson*, 508.
7. Under subdivision 2 of section 354, third division, Compiled Statutes, providing that "a new trial shall be granted when the jury has been separated without leave of the court, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case," the reception by the jury of newspapers containing comments on the trial adverse to the defendant is misconduct, tending to show injury to the defendant; but while prejudice is presumed the presumption is not absolute, and may be removed by the State, and for this purpose the testimony of the jurors as to facts but not as to impressions may be used. — *Id.*
8. The presumption of injury to the defendant by the reading of a newspaper containing comments adverse to the defendant by one of the jury on the second and third days of a six days' trial is sufficiently removed by the fact that the act was severely criticised by the judge in the presence of the jury, and the bailiff ordered to cut from newspapers thereafter coming into the possession of the jury all references to the trial, and it is no ground for a new trial that three days after the discharge of the jury a newspaper, of a date subsequent to the order of the court, containing comments on the trial, was found in the jury-room, where there is absolutely no proof that a jurymen ever read it. — *Id.*
9. Under an indictment for defacing a notice of a petition for the laying out of a county road, it is not necessary for the Territory to prove on the trial that the petition had been presented to the county commissioners, or that it was accompanied with affidavits relative to the time and place of posting the notice. (Case of *Territory v. Mackey*, 8 Mont. 168, distinguished.) — *Territory v. Lannon*, 1.
10. Under the statute which declares the theft of certain animals, whatever their value, to be grand larceny, it is unnecessary to allege or prove any particular value for the stolen animal, and that it had some value may be inferred by the jury from the facts and circumstances in the case, in the absence of direct testimony. — *Territory v. Pendry*, 67.
11. The plea of a former conviction will not be sustained under an indictment for an assault with a deadly weapon, with intent to inflict upon the person of another bodily harm, upon the proof of the conviction of the defendant in a Justice's Court under the charge of exhibiting a deadly weapon in the presence of one or more persons in a rude, angry, or threatening manner, not in necessary self-defense. The two prosecutions being based upon the same act of the defendant. — *Territory v. Stocker*, 6.
12. There is no abuse of discretion in refusing a motion for a continuance upon the ground of absent witnesses, whose testimony was required for the purpose

of proving that in 1844 the defendant was afflicted with disease which sometimes produced mental trouble; that from 1861 to 1864 he was in the military service of the United States, and was wounded; and that in 1863 and 1864 his reputation for peace and quietness in the community in which he then lived was good. — *Territory v. Roberts*, 12.

18. Where the examination of a juror for cause establishes the facts, that he knew nothing of the case, except having read newspaper accounts at the time; that he had formed and may have expressed an opinion; that he had no bias or prejudice in the case; that he could discard that opinion; that he could decide the case fairly and impartially upon the law and the evidence adduced upon the trial, he is competent under the provisions of subdivision 11, section 287, division 3, Compiled Statutes of Montana. — *Territory v. Bryson*, 32.

CRIMINAL COSTS.

See CONSTITUTIONAL LAW, 2; CRIMINAL LAW, 4.

DAMAGES.

1. In an action for damages for injuries to the person, where the evidence showed that the plaintiff was fifty-four years old at the time of the accident; that the large bone of his leg was broken and run through the skin; that the ankle joint was broken and the small bone shattered so that an immediate amputation of the foot was necessary; that it was over a year before the leg healed up, small pieces of bone coming out at different times; that he had been unable to walk without crutches; that an artificial foot caused him pain; that he was under medical treatment for two months, which cost him \$800; that his wound was very painful until it healed and at times afterwards; that he was deprived almost entirely of attending to his business, which would be more profitable if he could attend to it; that at times he was obliged to employ other help; that his general health was as good after as before the accident, but he was not as strong and could not take exercise; that his partner considered him of no account since the accident, but before he was able-bodied and did considerable work about their store; that outside of manual labor he was as good a man as before; that they were in the hardware business. *Held*, that in the absence of proof as to the value of plaintiff's business, a verdict of \$20,750 was excessive, and a new trial would be granted unless plaintiff would remit all but \$10,750 with interest. — *Kennon v. Gilmer*, 103.
2. In an action for damages sustained to a stock of goods, plaintiffs' witnesses placed the damages at from fifteen thousand to twenty-two thousand five hundred dollars. An expert called by the defendant placed them at from fifteen hundred to three thousand dollars, and the defendant, who had casually looked through the store for five minutes, placed them at twenty-five dollars. The verdict was for one hundred dollars. The court below, on plaintiffs' motion, granted a new trial, on the ground that there was no evidence to sustain the verdict. *Held*, that the granting of a new trial, where there is a conflict in the testimony, is in the discretion of the trial judge, and will not be disturbed where there is such conflict and there is no abuse of discretion, but that the conflict must be substantial and not shadowy; and where the alleged conflict is utterly unsubstantial and trivial it must be considered that there was none, and the granting of a new trial was not an abuse of discretion on the part of the judge, although he was the successor of the judge who tried the case. (Case of *Chauvin v. Valiton*, 7 Mont. 584.) — *Landsman v. Thompeon*, 182.
3. In an action of claim and delivery, where the demand for damages was for unlawfully detaining the property, a judgment for the amount expended in replacing the goods was improper, but could be recovered under proper pleadings. — *Dutro v. Kennedy*, 101.

DAMNUM ABSQUE INJURIA.

See MAXIMS, 1.

DEED.

1. The consideration upon the face of the deed is not conclusive. — *Ming v. Fouts*, 201.
2. It is no objection to a deed from a probate judge that the grantor described himself in the deed as "N. Hilger, Probate Judge of Lewis and Clarke County, Montana Territory," and executed it, "N. Hilger, Probate Judge." — *Id.*
3. A description of lots in a town site, which has been officially platted and surveyed by the lot and block number, is a sufficient description of the *locus in quo*. — *Id.*

DEFAULT.

1. On a motion to open a default and set aside a judgment, it appeared that defendant was living at a remote place, fifty miles from the county seat, with his family temporarily sheltered in a tent; that he made a journey of thirty-two miles to place the matter of his defense in the hands of one B., his business associate, who immediately, and eight days before the defendant's time for answering expired, employed counsel, who prepared an answer containing an absolute defense on the merits; that at this time B. was laboring under financial troubles which caused him to forget defendant's business until the last day, when he verified the answer, which was promptly mailed to the clerk of the court, and filed on the evening of the day on which defendant's default was taken, and two days after his time for answering had expired. *Held*, that sufficient diligence was shown to entitle the defendant to be relieved from a judgment by default. — *Heardt v. McAllister*, 405.
2. Where a motion to open a default was made on the same day it was taken, and was supported by an affidavit showing that the defendant was sued in his official capacity as sheriff, and that on the day after the service of the summons was injured in the discharge of an official duty, by reason whereof he inadvertently neglected to employ counsel, and the answer tendered alleged a good defense; *held*, that under section 116, Code of Civil Procedure, the neglect was excusable and the default should be set aside. — *Benedict v. Spendiff*, 85.

DENIAL.

See OFFICIAL BONDS, 2.

DEPOT PRIVILEGES.

See RAILROADS, 1, 2, 3.

DOWER.

1. No portion of "an act concerning dower," enacted by the ninth legislative assembly of 1876, is embraced in any section of the Revised Statutes of 1879, and is therefore not expressly repealed by section B, chapter lxx. of the Revised Statutes, providing that "all acts of the legislative assembly passed prior to the twenty-first day of February, 1879, or on said day, any portion of which is embraced in any section of said codification, are hereby repealed," and "that all acts of the legislative assembly passed prior to or on said last-named day, no part of which are embraced in said codification, shall not be affected or changed by its enactment," but is in full force, and has not been repealed by implication by reason of its omission from the Revised Statutes of 1879 and the Compiled Statutes of 1887. — *Chadwick v. Tuton*, 354.

2. Where the widow has taken lands devised to her under the provisions of the will, she is barred from claiming dower by sections 6 and 7 of said act concerning dower, which provide, in substance, that every devise of lands shall be in lieu of dower, unless within one year after the probate of the will she elect to renounce such devise and take her dower therein.— *Id.*

EJECTMENT.

1. A complaint in ejectment which avers that at the time set forth "the plaintiff was the owner, seised in fee, and entitled to the possession" of the premises described, and avers that "while plaintiff was so seised, the defendant, upon the ——— day of March, 1889, without right or title, entered into possession of the demanded premises, ousted and ejected the plaintiff therefrom, and wrongfully withholds the possession thereof from plaintiff to its damage in the sum of five hundred dollars," contains sufficient averments of title and ouster, and a motion to make more specific was properly denied. (Cases of *McCauley v. Gilmer*, 2 Mont. 202; *Billings v. Sanders*, 8 Mont. 205, cited.) — *First National Bank of Helena v. Roberts*, 323.
2. An averment in an answer to a complaint in ejectment that the plaintiff, a national bank, had no legal capacity to take a deed to the premises in controversy, by reason of the provisions of the laws of the United States governing national banks, is not a defense available to the defendant, and was properly stricken out on motion of plaintiff. — *Id.*
3. Under the rules of law, a lessee, though in possession at the time of the making of the lease, cannot, in the absence of deception, fraud, or duress, deny the landlord's title; and also under the provisions of section 87 of the Code of Civil Procedure, providing, in substance, that when the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord.— *Parrott v. Hungenburger*, 526.
4. Where the court found in the case at bar that "the evidence on the part of the defendant also shows the erection of improvements on the lot in controversy, the value of which is variously estimated by different witnesses at from four hundred to one thousand dollars," and the replication admitted improvements of the value of four hundred dollars, *held*, that the sum of four hundred dollars should be offset against the judgment for rents and profits. — *Id.*
5. Where a deed from a probate judge is relied upon for title in an action of ejectment, it is entitled to the presumption of regularity in its favor, as against the defendant claiming under an alleged deed from the same source of title issued fifteen years later, without affirmative proof of the preliminary steps conferring authority to make the grant. — *Ming v. Foote*, 201.

ELECTIONS.

1. Under section 1044, fifth division of the Compiled Statutes, providing that technicalities or error in spelling the name of any candidate for office shall be disregarded on the trial, it was properly ordered, in the trial of an election case, that certain votes with the name "Dan Heyfron," a candidate for the office of sheriff, should be counted for Daniel J. Heyfron, he being a candidate for the office for which such votes were cast, and being the only person having this surname within the county. — *Heyfron v. Mahoney*, 497.
2. Where there is a fair vote and an honest count, it is no ground for the rejection of the returns of a voting precinct that the judges of election were not sworn. — *Id.*

2. Where the election in a certain voting precinct was held at a place more than three miles distant from the place designated by the commissioners of the county the election is void, and the vote returned from such precinct is properly excluded from the total of votes cast in the county. — *Id.*
4. Where it appeared that a certain number of votes cast at a particular precinct were illegal, a finding by the court, apportioning said illegal votes and deducting them from the whole vote received by each party to the contest, in the proportion that the vote of each party bore to the whole vote cast at said precinct, was proper, where there was evidence to support the finding, although the entire vote of such precinct might have been properly excluded as tainted with fraud. — *Id.*
5. The provisions of the Code of Civil Procedure relating to amendments to pleadings apply to election contests, and the permitting of an amendment to a statement of contest in correcting the spelling of the names of persons and the addition of other names to conform to the proof is not an abuse of judicial discretion, when it does not appear that the adverse party was misled thereby. — *Id.*
6. Upon the trial of an election contest the contestant offered in evidence a subpoena, together with the return of the coroner, showing that he was unable to find the persons named therein comprising the alleged illegal voters. *Held*, that the subpoena and return tended to prove a proper effort on the part of the contestant to bring before the court the best evidence, and was properly admitted. — *Id.*
7. Section 1014, fifth division of the Compiled Statutes provides that election contests of county officers shall be tried by the District Court, and the person decided by said court to be elected shall be entitled to hold the contested office "until such decision shall be revised on appeal." Section 418 of the Code of Civil Procedure provides that "a judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this act." Section 444 of the Code of Civil Procedure provides for an appeal to the Supreme Court from the District Court "from a final judgment entered in an action or special proceeding" and "from an order granting or refusing a new trial." The Constitution, article viii., section 8, declares that "the appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity." Section 11 defines the jurisdiction of the District Court to extend to all cases in law and in equity, including certain enumerated cases, "and for all such special actions and proceedings as are not otherwise provided for." Section 15 allows writs of error and appeal "from the decisions of said District Court under such regulations as may be prescribed by law. *Held*, that these provisions when construed together extended the appellate jurisdiction of the Supreme Court to all cases, actions, and proceedings which have been finally decided in the District Courts, and included an appeal from an order refusing a motion for a new trial in an election contest. — *Lloyd v. Sullivan*, 577.
8. In the case at bar, the statement of contest alleged that the county clerk, disregarding his duty, issued a certificate of election to the respondent, claiming, in support of such illegal action, to have knowledge of the return of a large number of votes for respondent from a particular precinct, which said returns had not been included in the abstract of votes, and which said votes, had they been so returned, would have given respondent the highest number of votes for the office; that there were no legal returns from said precinct. These allegations were denied by the respondent in his answer. *Held*, that the issues raised by the pleadings involved the question of the validity of the returns from said precinct. — *Id.*
9. In the case at bar an election at a particular precinct was conducted by three judges instead of five, as required by law. The clerks selected to serve performed no clerical duties, but signed the returns the second or third day after the election. The canvass of the votes was conducted privately, and not in public as required by law, several persons being ejected, and others who sought admittance

found the doors locked. The certificate of the returns was irregular, being certified by the judges and attested by the clerks, instead of being certified by the clerks and attested by the judges. The poll-book showed that after the judges and clerks had voted the entire remainder of 169 electors cast their ballots in alphabetical order, and that every elector voted for a candidate for every office, and for or against the constitution. It appeared in evidence that all the electors did not vote for or against the constitution; that one elector did not vote, though his name was on the poll-book as having voted; that some electors did not vote for certain candidates, and some votes were returned for candidates other than for whom they were cast; that ballots were stamped by the judges after the polls were closed; that the voters did not go to the polls in alphabetical order. *Held*, that the returns of such precinct were fraudulent, and did not truly state the vote which each candidate for office received at the election.—*Id.*

10. Subpoenas, with their returns duly verified, showing the names of voters at a particular precinct who could not be found, are admissible in evidence in an election contest to establish diligence on the part of the contestant in seeking to procure the best evidence. (*Heyfron v. Mahoney*, ante, p. 497, affirmed.)—*Id.*
11. In an election contest where fraud at a particular precinct is shown, both by direct and circumstantial evidence, the entire vote of such precinct must be rejected. The legal votes cast are not invalidated by the fraud, but the person claiming the benefit of such votes must prove them.—*Id.*

EQUITY.

In the case at bar the plaintiff, in following its vein in the dip and beyond the side lines of its claim, had been working within the limits of defendants' claims. An injunction had been granted restraining the defendants from working upon the mining claim of plaintiff, and afterwards an order was granted upon defendants' motion, permitting them to prosecute certain specified work within the boundaries of their own claim under certain restrictions and the control of the court, for the purpose of obtaining evidence for the trial of the case, and the ascertainment and determination of the rights of the parties, and the continuity and identity of the veins in question, and to prosecute development and other work pending the litigation. *Held*, that the granting of the order was within the equity powers of the District Court, and being in effect an order for an inspection and survey for the discovery of the truth, was not an abuse of judicial discretion.—*Blue Bird Mining Company v. Murray*, 468.

ESTOPPEL.

1. An attorney in fact, who, by advantage of his agency, conveys the legal title of the land of his principal to himself, is not thereby estopped from asserting a prior equitable title in himself in an action by the principal to annul the conveyance. *Davis v. Davis*, 267.
2. In the case at bar, in an action brought by the plaintiffs for the purpose of recovering the price of certain cigars, defendant sought to recoup damages sustained to his business by a breach of the contract on the part of the plaintiffs. The court sustained a demurrer to the answer upon the ground that the contract was void as against public policy, being in restraint of trade. Defendant accepted the ruling, and amending his answer, pleaded the same contract as an absolute defense. Upon a trial the court found as a conclusion of law that the contract was not void, and rendered judgment for plaintiffs. *Held*, that plaintiffs having procured a ruling of the court that the contract was void, were bound by their theory of the case, and were estopped from receiving the benefit of the subsequent ruling to the effect that the contract was valid. *Held*, also, that the latter ruling of the court in construing the contract was correct; but when considered with the former ruling upon the demurrer, it deprived the defendant of a substantial right.—*Newell v. Meyendorff*, 254.

EVIDENCE.

See MINES AND MINERAL LANDS, 4; ELECTIONS, 6, 10.

Whenever there is any evidence to support the verdict or findings of the court, and there is no manifest error, neither will be interfered with. — *Fitschen v. Thomas*, 52.

EVIDENCE, CRIMINAL.

See INSTRUCTIONS, 7; CRIMINAL LAW.

1. The testimony of a witness who heard the defendant say to his accessory, a few moments before the shooting, that he would "kill the son of — ——" is part of the *res gestæ* and admissible, though the threat did not disclose the name of any person, it being established by the evidence that the person so threatened was the deceased. — *State v. King*, 445.
2. It is not error to allow the State to read in evidence to the jury the whole of the testimony of the prosecuting witness, given at the preliminary examination, where a portion of such testimony has been so read by the defense. — *State v. Jackson*, 508.
3. There is no error in the refusal of the court to allow the defense to ask the prosecuting witness "whether she said that she would suicide if Jackson were not convicted," for the purpose of showing prejudice against the defendant, as such matter is wholly immaterial, and its exclusion no injury to the defendant. — *Id.*
4. The contents of a lost instrument, as a criminal complaint, may be proved by oral testimony, where the foundation for the introduction of such testimony is sufficiently laid. — *Territory v. Stocker*, 6.
5. Under a plea of former conviction the question is as to the identity of the two offenses for which the defendant was prosecuted; and a variance in the testimony, as to who made the complaint in the first trial, is immaterial. — *Id.*
6. Where a witness testified as to threats made by the defendant against the deceased two months before the shooting, which were objected to as being too remote; *held*, that the mere lapse of time does not exclude the evidence of threats which have a direct relation to the case, as no rule of limitation runs against evidence as to malice in cases of homicide. — *Territory v. Roberts*, 12.
7. Where it appeared that certain witnesses who testified to the sanity or insanity of the defendant were laymen, and gave as a reason for their opinion that they were well acquainted with the defendant, and had observed his conduct during the period in regard to which they testified. *Held*, that the testimony was competent. — *Id.*
8. Where the evidence shows a *prima facie* case of conspiracy between parties to commit a crime, whatever is said by either of such parties at the time of the commission of the act complained of is part of the *res gestæ* and admissible in evidence. — *Territory v. Campbell*, 16.
9. It is not error to refuse to allow the defendants to ask the wife of the prosecuting witness, whether there was not a good deal of enmity existing between her husband and one D, as such a state of feeling could have no bearing upon the guilt or innocence of the accused, much less as to how the witness felt towards the defendant. — *Id.*
10. Proof of threats, made by the prosecuting witness against the life of the defendant, and communicated to him, is inadmissible as a defense, unless, at the time of the perpetration of the crime, the prosecuting witness indicated by his conduct an intention to carry them into execution. — *Id.*
11. An objection to the admission of certain letters in evidence, on the trial, is insufficient if no grounds of objection are stated. — *Territory v. Bryson*, 32.
12. Newly-discovered evidence reviewed, and held immaterial and insufficient for the purpose of a new trial. — *Id.*

13. The evidence reviewed and held sufficient to sustain a conviction of murder in the first degree. — *Id.*
14. The evidence reviewed and held sufficient to support a conviction of murder in the first degree. — *Territory v. Johnson*, 21.

EXEMPTION.

See HOMESTEAD, 1.

EX POST FACTO LAW.

See CONSTITUTIONAL LAW, 10.

FIXTURES.

1. Fixtures attached to the realty after the execution of a mortgage may be properly sold by the mortgage creditor, where no issue is raised in the pleadings upon the point. — *Dutro v. Kennedy*, 101.
2. The remedy of a mortgage creditor against a mortgagor removing fixtures is by injunction, or an action for damages or claim and delivery where the removal is completed. — *Id.*

FORECLOSURE.

See JUDGMENT, 2; FIXTURES, 1.

FORFEITURE.

See PLEADING, 1.

FRAUD.

See PLEADING, 7; ELECTIONS, 4, 9, 11.

GRAND JURY.

See CONSTITUTIONAL LAW, 9.

1. In the case at bar the judge of the district in which the defendant was tried ordered a grand jury to be summoned, and afterwards directed that the venire be returned, and the persons who had been served, notified that their services would not be wanted. The sheriff's return showed that all the persons drawn to act as grand jurors had been served. Upon the meeting of the court it was ordered as follows: "It appearing that no grand jurors have been summoned and that a grand jury is wanted: Ordered, that the judge and clerk of this court do forthwith prepare a list of twenty persons competent to serve as grand jurors, who shall be summoned by the sheriff to be and appear before said court on the ninth day of January, 1890, at ten o'clock, A. M." The persons summoned under the latter order were selected to serve. A challenge interposed by the defendant to the panel, for the reason that the same was not drawn in accordance with the essential provisions of the law of Montana, was overruled. *Held*, that under section 14 of an act relating to jurors, approved March 14, 1889, making it lawful for the judge of the District Court and the clerk of the court to prepare a list of names of persons to be summoned as grand jurors, when from any cause during the term of a court a grand jury is wanted, and under section 8, article iii. of the Constitution, declaring that a grand jury shall only be drawn and summoned when the district judge shall in his discretion consider it necessary and shall so order, the grand jury was legally organized, though the order did not show the necessity therefor, and though it consisted of seven persons. *Held, also*, that the prosecution of the defendant by indictment and not by information was proper. — *State v. King*, 445.

2. Section 145 of the Criminal Practice Act directs that in the investigation of any charge for the purpose of finding an indictment, the grand jury shall receive none but legal evidence. *Held*, that the statute was directory and not mandatory; that it was the duty of the grand jury to reject illegal evidence whenever aware of it, but that the law did not annul an indictment for such cause, as it was not one of the grounds enumerated in section 206, Criminal Practice Act; and that a question to one of the grand jury upon motion to set aside the indictment, as to whether he knew what was legal evidence, was properly refused. — *Territory v. Pendry*, 67.

HABEAS CORPUS.

See TRIAL, 1.

On habeas corpus, this court cannot consider an objection that the verdict is null and void because contrary to the decision of the trial court that the evidence was insufficient, as the remedy for such error is a motion for a new trial. — *In re Thompson*, 381.

HOMESTEAD.

- A homestead is subject to the lien of a mechanic for material, as well as labor, where the material is the object of the labor for which he claims his lien. — *Merrigan v. English*, 113.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

See MARRIED WOMEN, 1.

IDEM SONANS.

See CRIMINAL LAW, 5.

IMPRISONMENT FOR COSTS.

See CRIMINAL LAW, 4.

INDIANS.

See CONSTITUTIONAL LAW, 5, 6.

INDICTMENT.

See GRAND JURY, 1.

- An indictment which charged the appellant with murder in the first degree and another person with being an aider and abettor is not demurrable as charging two offenses, as under the laws of this State an accessory may be charged, tried, and convicted in the same manner as if he were a principal. — *State v. King*, 445.

INFORMATION.

See CONSTITUTIONAL LAW, 8, 9; GRAND JURY, 1.

INJUNCTION.

See EQUITY, 1.

1. An order which modifies and thereby partially dissolves an injunction is appealable, and may be reviewed upon the papers used on the hearing in the court below, properly certified, and no bill of exceptions is necessary. — *Blue Bird Mining Company v. Murray*, 468.
2. The granting or refusal of an injunction is a matter of discretion in the court below. — *Id.*

INSANITY.

See EVIDENCE, CRIMINAL, 7.

INSTRUCTIONS.

See NOTARY PUBLIC, 2; CRIMINAL LAW, 1.

1. Where an instruction, standing alone, is erroneous, but when in connection with other instructions the law is correctly stated, the error is harmless. — *Fitschen v. Thomas*, 52.
2. It is not error for the court to refuse an instruction requested by defendants which is based upon a different theory from that contained in their answer. — *Id.*
3. In an action for damages for malicious injury to unenclosed lands, where the verdict was for the defendant, the giving or withholding of an instruction as to exemplary damages become immaterial, as the jury must have found that the injuries charged were not malicious. — *Fant v. Lyman*, 61.
4. An instruction, defining a reasonable doubt, which uses the phrases, "in their own most important concerns or affairs of life," and "in the graver and more important affairs of life," is not erroneous as conflicting. — *State v. King*, 445.
5. Where the jury were instructed that the proof must show beyond a reasonable doubt "that the steer belonged to the company as alleged in the indictment," and in another instruction the court used the following language: "If he drove the steer in off the range, when it was the property of the corporation charged in the indictment;" *held*, that the instructions should be considered together, and that the latter instruction was clearly hypothetical and did not assume the fact of ownership. — *Territory v. Jagers*, 5.
6. An instruction which is a verbatim copy of section 21, division 4, Compiled Statutes, defining murder in the first and second degrees, and requiring the jury to designate by their verdict the degree thereof, is proper, when followed by a full charge upon the crime of manslaughter, and that the jury could not convict of a higher crime unless every characteristic of such higher crime was proved beyond a reasonable doubt, and that they must acquit the defendant if they had any reasonable doubt of his guilt. — *Territory v. Johnson*, 21.
7. Where the evidence as to the bad character of the deceased was very slight, an instruction which assumes that the character of the deceased for violence had been proved was properly refused. — *Id.*
8. When the court had given the instruction in substance as requested by the defendant, there is no error of which the accused can complain in the refusal of the court to repeat the instruction. — *Territory v. Pendry*, 67.

INTEREST.

See JUDGMENT, 4.

In an action on an official bond, where a demand has been made for money due, and payment refused, the sureties are liable for legal interest from the date of such demand, even though the principal with such interest added exceeds the penalty of the bond. — *Maddox v. Rader*, 126.

INTERVENTION.

Where a chattel mortgage on the same property is given to secure two notes to different holders, due at the same time, and an action was commenced upon the sheriff's bond by one of the mortgagees for official misconduct at the foreclosure sale; *held*, that the mere commencement of the action did not give such mortgagee priority in exhausting the penalty of the bond, and that the other mortgagee was properly allowed to intervene. — *Maddox v. Rader*, 126.

JUDICIAL DISCRETION.

See EQUITY, 1; INJUNCTION, 2.

JUDICIAL OFFICER.

See TOWN SITE, 1.

JUDGMENTS.

See DEFAULT, 1; OFFICIAL BONDS, 1; TOWN SITE, 2; PLEADING, 4, 5.

1. In the case at bar, although the contract was void, judgment cannot be ordered for the defendant where it is impossible for this court to determine whether the jury cut down the demand of the plaintiff, or allowed a portion of defendant's counter-claim, and the case must be remanded for a new trial. — *Lebcher v. Board of Commissioners of Ouster County*, 815.
2. Where the defendant in such case conveys the property after arrest and before the judgment is docketed, the proper remedy for the enforcement of the judgment is an action against the defendant and grantee to foreclose the lien. — *Silver Bow County v. Strumbaugh*, 81.
3. A judgment entered at a former term may be amended (by the trial court by inserting the plaintiff's true name, and may be entered *nunc pro tunc* as amended. — *Barber v. Briscoe*, 341.
4. Under section 1287, fifth division, Compiled Statutes, providing in substance that creditors shall be allowed to collect and receive interest on any judgment from the day of entering up such judgment, a judgment entered *nunc pro tunc* bears interest from the date on which the judgment is to be regarded as entered. — *Id.*

JURISDICTION.

See PLEADING, 4; ELECTIONS, 7.

JUROR.

See CRIMINAL LAW, 13.

JUSTICE'S COURT.

The defendant appealed to the District Court from a judgment by default rendered against him in a Justice's Court, and appearing specially, moved to dismiss the action upon the ground of a defective summons. *Held*, that the defendant having appeared generally in taking his appeal, thereby waived the irregularities in the summons, and could not subsequently appear specially for the purpose of a motion to dismiss. — *Gage v. Maryatt*, 265.

LANDLORD AND TENANT.

See EJECTMENT, 3.

LANDS.

See UNENCLOSED LANDS, 1.

LARCENY.

See INSTRUCTIONS, 5; CRIMINAL LAW, 10.

LEGISLATIVE POWER OF TERRITORY.

See CONSTITUTIONAL LAW, 7.

LIQUIDATED DAMAGES.

See CONTRACTS, 3.

LIQUOR.

See CONSTITUTIONAL LAW, 5, 6, 7.

LOCATION NOTICE.

See MINES AND MINERAL LANDS, 1, 2.

LOST DOCUMENT.

See EVIDENCE, CRIMINAL, 4.

MALICIOUS TRESPASS.

See UNENCLOSED LANDS, 1.

MANDAMUS.

1. The relator applied for a writ of mandate to compel the State auditor to draw his warrant for the payment of an account due it for public printing, under section 1686 of the fifth division of the Compiled Statutes, which provides that the governor and auditor shall examine the "itemized account" of the contractor, which shall be rendered "once in each month," and "if they find it to be correct and in accordance with the provisions of this chapter, the auditor shall draw his warrant on the territorial treasurer for the payment of the same." *Held*, that under section 34, article v. of the Constitution, which provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the public officer in pursuance thereof, except interest on the public debt," and section 10, article xii., which provides that "no money shall be drawn from the treasury but in pursuance of specific appropriations made by law," the relator was not entitled to the relief demanded in the absence of a lawful appropriation. *Held, also*, that the relator had a plain, speedy, and adequate remedy in an application to the legislative assembly for an appropriation to pay the claim. — *State ex rel. Journal Publishing Company v. Kenney*, 389.
2. Under section 575 of the Code of Civil Procedure, relating to writs of mandate, it is no ground for the refusal of a writ of mandate that certain specific facts alleged in the respondent's answer were not denied in the relator's replication, where the pleadings raised questions of law only, and where relator relied upon the facts alleged in his affidavit, and expressly admitted by respondent's answer, as ground for the relief which he prayed for. — *State ex rel. Thompson v. Kenney*, 223.
3. In an action for a writ of mandate brought by relator, a member of the legislative assembly, against the auditor of the State, to require him to audit and settle relator's claim against the State for his compensation and mileage as a member of the House of Representatives, and to issue him a certificate therefor, as provided in section 121, fifth division of the Compiled Statutes, where it was alleged in respondent's answer that another person held a certificate of election to the same office which relator claimed to be occupying, and it did not appear that a contest of the election of relator was pending in the house of which he claimed to be a member. *Held*, that upon sufficient *prima facie* evidence of relator's membership of the House of Representatives of this State he would be entitled to the relief asked for. — *Id.*

MARRIED WOMEN.

The common-law disability of husband and wife to enter into contracts with each other is not removed by the provisions of sections 1434 and 1435 of the fifth division of the Compiled Statutes, defining and prescribing the rights and liabilities of a married woman who has filed a declaration of sole trader, and a promissory note made by such married woman to her husband is a nullity and void in the hands of a *bona fide* purchaser. (Case of *Vanillburg v. Black*, 3 Mont. 459, cited.) — *Herron v. Frost*, 308.

MAXIMS.

See MINES AND MINERAL LANDS, 2.

1. Where domestic animals are driven upon unenclosed lands for the purpose of pasture, and for no malicious purpose, the injury thereby sustained to the owner of the lands is *damnum absque injuria*. — *Fant v. Lyman*, 61.
2. In the application of the maxim *communis error facit jus*, the existence and effect of the common error is a question of law for the court and not a question for the jury. — *O'Donnell v. Glenn*, 452.
3. The court laid down the following principles governing the application of the maxim *communis error facit jus*, subject to the qualification that in every case some of them are applied, while in some cases some of them may be disregarded, each case depending upon its own facts, and holding that the facts in the case at bar were almost wholly in conflict with all of such principles: (1) The common error must be one having some judicial or professional recognition, approved or tolerated by decisions of judges or opinions of lawyers. Or to put the rule less positively, such judicial or professional recognition adds to the law-making force of the common error. We further qualify the rule in this, that common error may possibly have the law-making power, when supported by lay opinion only, provided that other rules may be forcibly applied. (2) Courts will not likely or inconsiderately allow a common error to subvert a rule of law, or abrogate a positive statute. (3) The error must be a universal or very general one. The nearer universal, the more forcibly will it address itself as a law-maker to the approval of courts. (4) The acquiescence in the common error has involved, or there depends upon it large property interests. (5) The error must be one that the people have relied and acted upon, and have fixed their rights and positions thereby. (6) The longer the error has existed, the greater force it has. (7) The error must be clearly proved. (8) The error must be one in the observing, construing, or interpreting law, and not an error in directly disobeying and abrogating that which is law. — *Id.*

MECHANIC'S LIEN.

See HOMESTEAD, 1.

1. Under section 1370, fifth division, Compiled Statutes, a subcontractor has a direct lien for the reasonable value of his labor and materials. — *Merrigan v. English*, 113.
2. The repeal of section 1367 of the Compiled Statutes, providing that every contractor, subcontractor . . . having charge, in whole or in part, of the building, shall be deemed the agent of the owner, did not repeal the direct lien given to subcontractors by section 1370. Section 1370 of the Compiled Statutes, giving a subcontractor a direct lien, is not unconstitutional as forfeiting the owner's property to persons with whom he never contracted. — *Id.*
3. Where the work for which a lien is filed was done by a subcontractor subsequent to the filing of a mortgage, such lien takes precedence of the mortgage, and dates from the commencement of the work by the original contractor. — *Id.*

MINES AND MINERAL LANDS.

See **MAXIMS**, 2, 3; **ALIEN**, 1, 2; **PLEADING**, 1; **CONSTITUTIONAL LAW**, 8.

1. A location notice of a mining claim is fatally defective which fails to state under oath the date of the location. — *O'Donnell v. Glenn*, 452.
2. Where it appeared that a particular form of verification to notices of location of mining claims had been used in a county in the Territory in not to exceed thirty-three per cent of the notices of location, extending over a period of three years, and which form was not in compliance with law, the maxim *communis error facit jus* does not apply, and it is error to instruct the jury that "the failure or omission to give the date of the location in the verification did not render the location invalid (the error or omission having been one of frequent occurrence at the time)." — *Id.*
3. Under section 2325, Revised Statutes of the United States, the certificate of the surveyor-general is evidence of the sufficiency of the work performed and improvements made upon a mining claim in his State; and in an action to annul a patent it is error to strike out of the answer an averment that the surveyor-general for Montana took the evidence required by law, and decided that the defendants had performed work and placed improvements upon the claim of the value of five hundred dollars. — *United States v. King*, 75.
4. Where the complaint in such action alleged in substance that the patentees did not discover any mineral lead, ledge, or vein of rock in place, bearing gold or other metals, and the evidence is conflicting upon the point, proof that the claim was deemed valuable for mining purposes was held sufficient, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit to constitute a mine within the meaning of the statute. — *Id.*
5. Section 2322, Revised Statutes of the United States, provides in substance that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the apex of which lies within the vertical planes of the lines of the surface location, although such veins in their inclination on their course downward cross the vertical plane of a side line; *provided*, that such exterior parts lie within the projected planes of the end lines. *Held*, that where a vein crosses the side line of a location the strike is terminated by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane, parallel to the end lines, drawn downward, and which takes effect at the point where the apex intersects the side line. — *King v. Amy and Silversmith Consolidated Mining Company*, 548.

MISCONDUCT OF JURY.

See **CRIMINAL LAW**, 6, 7, 8.

MORTGAGE.

See **CONVEYANCES OF REALTY**, 1; **MECHANIC'S LIEN**, 3.

MOTIONS.

See **PRACTICE**, 3, 4; **ATTACHMENTS**, 1, 2, 3; **PRACTICE, CRIMINAL**, 2, 6.

MUNICIPAL CORPORATIONS.

See **CONTRACTS**, 1.

NATURALIZATION.

See **ALIEN**, 2.

OFFICIAL BONDS.

NEGLIGENCE.

See PARTNERSHIP, 8.

NEGOTIABLE INSTRUMENTS.

See MARRIED WOMEN, 1.

NEW TRIAL.

See PRACTICE, 1, 2, 3, 5, 6, 7, 10, 11; DAMAGES, 2; PRACTICE, CRIMINAL, 2, 6.

NEWSPAPERS.

See CRIMINAL LAW, 6, 7, 8, 12.

NONSUIT.

See ASSUMPSIT, 1; ALIEN, 1.

NOTARY PUBLIC.

1. Section 547 of the Code of Civil Procedure, which provides that a judge shall not act as such in an action or proceeding to which he is a party, or in which he is interested, when he is related to either party by consanguinity or affinity within the third degree, or when he has been attorney or counsel for either party in the action or proceeding, applies to a judge of a court, and does not include notaries public, nor apply to their actions in taking and certifying an acknowledgment to a deed. — *First National Bank v. Roberts*, 323.
2. The acknowledgment of a deed is valid when taken by a notary who is the attorney and nephew of a party, who, though active in procuring its execution, is neither a party to the deed nor beneficially interested in its execution or delivery; and instructions which assumed that the deed was executed for the benefit of such party were properly refused. — *Id.*
3. A county attorney may hold the office of notary public, and it is no objection to an affidavit used by the State on a motion for a new trial that the notary before whom it was taken was the county attorney. — *State v. Jackson*, 508.

NOTICE.

See PRACTICE, 2, 3.

OATH.

See ELECTIONS, 2.

OFFICE HOURS.

See ATTACHMENTS, 4.

OFFICIAL BONDS.

See SHERIFF, 1, 2; INTEREST, 1; INTERVENTION, 1.

1. In an action against the sureties, upon the official bond of their principal, a city treasurer, for a breach thereof, where the sureties had limited their penal obligation to specified sums, which sums were also set opposite their respective signatures, and the bond contained a general provision as follows: "For the payment of which well and truly to be made we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents." *Held*, that this general provision of the bond being inconsistent with the particular provision limiting the liability of the sureties, the latter would prevail, and the sureties were bound severally and not jointly. *Held*, also, that in case of a breach of the condition of the bond, the judgment against any surety should

not exceed the amount for which he bound himself, and might be enforced to that amount against each surety sued until the judgment was satisfied. — *City of Butte v. Cohen*, 435.

2. It is a good defense to an action against the sureties on the official bond of a city treasurer that such treasurer was, by an ordinance of the city, entitled to receive as compensation one sixth of all moneys collected by him, whereas he had only retained one tenth, and that the difference would more than counter-balance the amount he was charged with having embezzled; and such defense is available to the sureties under a specific denial. — *Id.*

OFFSET.

See EJECTMENT, 4.

ORDERS.

See EQUITY, 1; CONSTITUTIONAL LAW, 3.

ORDINANCES.

1. An ordinance, framed and adopted by the constitutional convention, and appended to the constitution, and with it adopted by the people, has the same force and effect as a constitutional provision. — *State ex rel. Thompson v. Kenney*, 223.
2. The effect of an ordinance upon the statute is to change and modify its provisions so far as it is necessary to give the provisions of the ordinance full scope and effect. — *Id.*

PARTIES.

Where a bond is executed by sureties for the fulfillment of a contract entered into by their principals in a separate instrument, both principals and sureties may be sued jointly in an action for a breach of the contract. — *Wibaux v. Grinnell Live Stock Company*, 154.

PARTNERSHIP.

See ASSIGNMENT, 1.

1. Where one of two equal partners collects a private debt of his copartner, giving him no credit therefor, and uses it in the firm business, he is liable to his copartner for one half of such debt, though he has sold to him his entire interest in the firm business and partnership property. — *Pierce v. Ten Eyck*, 349.
2. Where one partner contributed a greater share to the firm than the other, which it was agreed should be deducted upon a dissolution, and subsequently terminates the partnership by a purchase of the other's interest, without reservation of any demands, he cannot recover the sum so contributed in excess, as the purchase operated as a relinquishment of such a claim. — *Id.*
3. Where it appeared in the case at bar that the purchasing partner voluntarily bought his copartner's interest when he feared the books were wrong and had not been properly kept, and afterwards discovered that he had paid a greater sum for such interest than he would have done had he known the true condition of the books. *Held*, that he could not recover such excess from the selling partner, having been negligent in purchasing upon the showing of books which he believed to be erroneous. — *Id.*
4. In the case at bar it was agreed between the plaintiff and defendant, who were partners, that during the absence of the defendant, who was to leave the business for three months, the firm should be credited with fifty dollars per month to compensate for defendant's loss of time. No such credit was ever given. *Held*, that plaintiff's claim for his share of such credit was extinguished by the purchase of defendant's interest. — *Id.*

PLEADING.

PASSENGERS.

See RAILROADS, 1, 2, 3.

PATENT.

See MINES AND MINERAL LANDS, 2.

PENAL STATUTE.

See CORPORATIONS, 1.

PENALTY.

See CONTRACTS, 2.

PLEADING.

See EJECTMENT, 1, 2; MANDAMUS, 2; CRIMINAL LAW, 3; MINES AND MINERAL LANDS, 3.

1. In an action for the possession of a mining claim, a party relying upon a forfeiture by his adversary must specially plead such forfeiture; and the facts constituting the same must be alleged and proved upon the trial. — *Wulf v. Manuel*, 286.
2. Defendant, Joseph Davis, who was the attorney in fact of the plaintiff, conveyed by virtue of such agency certain property belonging to the plaintiff to his co-defendant, who in turn reconveyed it to the defendant. In an action to annul the conveyances the defendant pleaded as a separate defense that the premises in controversy were purchased by the plaintiff, defendant, and another; that defendant supplied the money to pay for his share; that the deed was taken in the name of the plaintiff alone; that at the time of, and prior to the acts complained of, the legal title to such share was in the plaintiff, but that there was a resulting trust in favor of the defendant, and that defendant had an equitable title to said share in the premises when the power of attorney was made to him. *Held*, that this defense was a good original cause of action in defendant's favor against the plaintiff if defendant sought a reconveyance of that share from the plaintiff, and was properly set up in the answer under the provisions of sections 89 and 90, chapter 4, Code of Civil Procedure. *Held*, also, that the acceptance by the defendant of the power of attorney, and his actions under it, did not deprive him of this cause of action, whether set up in an original action, or as an equitable defense in the case at bar against the plaintiff. *Quære*, under section 91, chapter 4, Code of Civil Procedure, must he not set it up or be afterwards barred from asserting it? — *Davis v. Davis*, 267.
3. Where the answer did not allege that the premises claimed by the defendant were located elsewhere than those described in the complaint, evidence offered by the defendant that the location of the lots described in the complaint was geographically different from the lots described by the same designation in the defendant's answer, was properly excluded. — *Ming v. Foote*, 201.
4. In pleading the judgment of a court of inferior jurisdiction, as a Probate Court, and the issuance of an attachment therefrom, the complaint must allege the facts which gave such inferior court jurisdiction over the defendant therein, and authorized it to issue the writ. — *Harmon v. Comstock Horse and Cattle Company*, 243.
5. Where in such case it was alleged that the writ of attachment was "procured," and the judgment was "rendered," *held*, that the allegations did not show the issuance of a valid writ of attachment or the entry of a lawful judgment, and that the pleading was fatally defective. — *Id.*

6. In an action for damages for the conversion of certain horses, alleged to have been attached as range stock under the provisions of chapter 6, title 7 of the Code of Civil Procedure, in an action in a Probate Court, the complaint must show that the horses referred to were range stock within the meaning of the statute. — *Id.*
7. The facts constituting constructive fraud must be alleged in order to be proved, and are not admissible under a general denial in an answer. — *Buckle v. Irvine*, 251.
8. Where the answer does not deny any of the facts upon which plaintiff's claim for a lien is based, but denies indebtedness to plaintiff, and that plaintiff had any lien; *held*, that the denials were conclusions of law, and no issues of fact were raised by the pleadings. — *Merrigan v. English*, 113.
9. Where the defendant pleads new matter in the answer as a defense, praying to be discharged, he is not concluded thereby from obtaining such relief as he shows himself entitled to. — *Davis v. Davis*, 267.

POLICE POWER.

See CONSTITUTIONAL LAW, 5.

PRACTICE.

See JUSTICE'S COURT, 1; PARTIES, 1; AMENDMENTS, 1, 2.

1. Where it appeared from an affidavit of defendant's attorney that a statement on motion for a new trial was served by leaving the original with the plaintiff's attorneys, who, after retaining it for three days, returned it to defendant's attorney, by whom it was then filed with the clerk of the court and afterward settled by the judge. *Held*, that the service was good, and that the proof of such service was properly made by the evidence of the person serving the same. — *Wulf v. Manuel*, 276.
2. A statement on motion for a new trial may be settled by the judge without notice to the adverse party, when no amendments have been filed within the time allowed by law. — *Id.*
3. A motion for a new trial made by defendant was heard and refused in the absence of plaintiff or his attorneys, and without notice. *Held*, that as the disposition of the motion was favorable to plaintiff there was no error of which he could complain. — *Id.*
4. A motion to strike from the transcript a statement on appeal, based upon the objection that the statement is not engrossed and the contents not arranged in chronological order, will be denied where the only offense is an inartistic arrangement of the matters contained therein. — *Id.*
5. Where the specifications of particulars, in which the evidence is insufficient to justify the verdict, are merely statements of the conclusions of the appellant that the evidence shows facts contrary to the findings of the jury, and no variance between the facts found by the jury and the evidence is pointed out, and no specification that any fact found by the jury is not sustained by the evidence, with the particulars in which the evidence is insufficient, they are not such specifications as required by subdivision 8 of section 298 of the Code of Civil Procedure. — *First National Bank of Helena v. Roberts*, 323.
6. Where no reasons are given in the transcript for the action of the court below in granting a new trial, and there is a substantial conflict in the testimony, the judgment will be affirmed. — *Kilby v. Baker*, 398.
7. An order of the court made before trial is not an error which can be made a ground for a new trial. — *Powder River Cattle Company v. Commissioners of Custer County*, 145.
8. Where defendants' answer admits the contribution by plaintiffs of the aggregate sum as alleged in the complaint, but avers the expenditure of a greater sum,

the excess being paid by defendants, which is denied in the replication, plaintiffs were not bound to introduce any evidence upon this point until defendants had produced theirs. — *Filschen v. Thomas*, 52.

9. The testimony of a witness will not be stricken out because he testifies to the best of his recollection; and the weight to be given it is a matter for the jury. — *Id.*
10. A statement on motion for a new trial which is not signed by the judge, with his certificate to the effect that the same is allowed, will be stricken from the record on motion in this court, and no implied authentication by waiver will be recognized. — *Scheerer v. Hale*, 63.
11. An order of the court striking out a portion of the answer, made before trial, is not an error of law occurring during the trial, and cannot be considered on a motion for a new trial, but may be reviewed only upon an appeal from the judgment taken within the time allowed by law. — *Id.*
12. In the case at bar, after the rendition of the verdict, the court asked defendant's counsel if he had any objection to the discharge of the jury, and understanding him to say, "I have none," discharged the jury; but counsel asserts that he objected in the words "I have." *Held*, that though the objection was insufficient, this court is bound by the recollection of the trial judge who certified the bill of exceptions. — *In re Thompson*, 381.

PRACTICE, CRIMINAL.

See GRAND JURY, 1, 2; APPEAL, 5, 6; TRIAL, 1.

1. An objection to the ruling of the trial judge, excluding a question asked upon the examination of a juror for cause, cannot be heard in this court for the first time. — *Territory v. Bryson*, 32.
2. Under section 1 of the Act of September 14, 1887, relating to motions for new trial, a statement on motion for a new trial may be settled and passed upon by the successor of the judge who tried the case. — *Id.*
3. It is not error for the court to refuse to incorporate into the statement of the case a portion of the argument of the prosecuting attorney, advancing a theory, in order to show that some newly-discovered evidence would overthrow such theory. — *Id.*
4. An exception taken to the ruling of the trial judge, excluding a question propounded by defendant to a juror on his *voir dire*, will not be considered by this court unless the record shows affirmatively that such juror was sworn and served, and that the defendant's peremptory challenges were exhausted before the jury was finally impaneled. — *Territory v. Campbell*, 16.
5. Successive prosecutions of an accused for offenses growing out of the same transaction is a matter which addresses itself to the sound discretion of the prosecuting attorney, who should be governed by the circumstances. — *Territory v. Stocker*, 6.
6. The denial of a motion of the defendant to strike out an affidavit proposed to be used by the State on the motion for a new trial is not error, where no notice of such motion had been given, and the defendant refused to give any, and insisted that the hearing of the motion for a new trial should proceed forthwith. — *State v. Jackson*, 508.
7. Where a challenge by the Territory to a juror was improperly sustained, but it appeared that "a jury of good and lawful men was sworn to try the case." *Held*, that the defendant was not injured by the exclusion of the juror, and such exclusion was no ground for a new trial. — *Territory v. Roberts*, 12.
8. Where the record contains no testimony to guide the court in determining the propriety of an instruction, which is correct in the abstract, no error will be presumed. — *Id.*

PRINCIPAL AND AGENT.

See WARRANTY, 3.

- A principal is responsible for the acts of his agent when they have been done within the scope of his authority, and this liability will not be enlarged.—*Kircher v. Conrad*, 191.

PRINCIPAL AND SURETY.

See PARTIES, 1; OFFICIAL BONDS, 1, 2; SHERIFF, 1, 2.

PRIORITY.

See INTERVENTION, 1.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See APPEALABLE ORDERS, 2.

1. An order denying a motion to set aside an order for an examination of a judgment debtor upon proceedings supplementary to execution is an appealable order. (Case of *Sperling v. Calfee*, 7 Mont. 514, cited.) — *Barber v. Briscoe*, 341.
2. Where no judgment had been entered or valid execution issued at the time of an order for the examination of a defendant on proceedings supplementary to execution, the proceedings are irregular, and cannot be cured by the subsequent entry of a judgment *nunc pro tunc*. — *Id.*

PROBATE JUDGE.

See TOWN SITE, 1.

PUBLIC PLACE.

Where a petition for the laying out of a county road was posted at a depot, six or seven hundred feet from the proposed road, *held*, to be a public place in the vicinity of the proposed road, within the meaning of section 1809, division 5, Compiled Statutes. — *Territory v. Lannon*, 1.

PUBLIC POLICY.

See RAILROADS, 1.

Plaintiffs and defendant entered into a contract, in which plaintiffs agreed that defendant was to have the sole and exclusive right of selling and dealing in a certain brand of cigars in Montana; that plaintiffs would not sell said cigars to any one else in Montana, upon the consideration that defendant would cease advertising and selling other brands of cigars from which he was deriving profit, and that he would purchase said brand of cigars from plaintiffs, and would introduce and promote the sale thereof. *Held*, that the contract was not general, but was limited to place and person; that it did not deprive the public of the restricted party's industry, but was simply a contract for the enlistment of defendant's services as an agent, and was therefore not void as a contract in restraint of trade. — *Newell v. Meyendorff*, 254.

RAILROADS.

1. A railroad company may not grant to one person the exclusive right to the use of a portion of its depot platform to deliver passengers departing, and to receive and solicit the patronage of incoming passengers, to the exclusion of all other persons from the exercise of such rights, as such grant is against public policy and con-

trary to the provisions of article xv., section 7 of the Constitution, which provides that "no discrimination in charges, or facilities for transportation of freight or passengers of the same class, shall be made by any railroad, or transportation or express company, between persons or places within this State." — *Montana Union Railroad Company v. Langlois*, 419.

2. Passengers arriving at or departing from the station of a common carrier are entitled to equal convenience and opportunity to approach said station or depart therefrom, and in so doing are entitled to whatever benefit of competition may grow out of the contests of others to supply the public demands and receive the compensation therefor. — *Id.*
3. A rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity and not discrimination, and the grant by a railroad company of a platform privilege at its depot to one hackman to the exclusion of all others is therefore not such a rule or regulation as applied to the right of a common carrier to make and enforce all reasonable rules and regulations necessary to govern persons coming to its station buildings, platform, and grounds. — *Id.*

RANGE.

See UNENCLOSED LANDS, 1.

RANGE STOCK.

See ATTACHMENT, 4; WARRANT, 4.

RAPE.

See CRIMINAL LAW, 3.

RATIFICATION.

See SHERIFF, 4.

RECORD.

See PRACTICE, CRIMINAL, 4; APPEAL, 1, 6.

REPEALS.

See DOWER, 1.

RES GESTÆ.

See EVIDENCE, CRIMINAL, 1, 2.

REVOCATION.

See WILLS, 1.

ROBBERY.

See CRIMINAL LAW, 1.

SERVICE OF PROCESS.

See ATTACHMENT, 4.

SHERIFF.

1. Money received by a sheriff from a sale of chattels under a mortgage containing a clause, authorized by statute, empowering the sheriff of the county to execute the power of sale therein granted, is received by him in his official capacity, and a failure to pay over such money is a breach of official duty for which his bondsmen are liable. — *Maddox v. Rader*, 126.
2. Section 850, fifth division, Compiled Statutes, prescribing, in substance, the conditions of a sheriff's bond, recites among other conditions that he "shall pay over all moneys that may come into his hands as sheriff." In this case the bond omitted such clause, but provided for the "well and faithful performance of all official duties now required of him by law." In an action on the bond for his failure to pay over money received from a sale of property under a chattel mortgage. *Held*, that as the sale of the mortgaged chattels was an official duty, the obligation to pay the money over was clearly within the conditions undertaken by his sureties. — *Id.*
3. An attorney at law representing the mortgagees at a sheriff's sale has no implied power to authorize the sheriff to accept credit bids. (LIDDELL, J., dissenting.) — *Id.*
4. Where a sheriff at a chattel mortgage sale sold some of the property for cash and some on credit, without authority, paying to the mortgagees the money received from the cash sales, the acceptance thereof is not a ratification of the credit sales where no conditions were attached to the payment. — *Id.*

SPECIFIC DENIAL.

See OFFICIAL BONDS, 2.

SPECIFIC PERFORMANCE.

1. A bond in the penal sum of five thousand five hundred dollars, in which the obligors covenant that if the obligees pay them five thousand five hundred dollars and interest, and if they, the obligors, do not make, execute, and deliver a deed of certain property, then the bond shall be in full force, otherwise to be null, cannot be specifically enforced so as to compel a conveyance of the property described therein upon a tender of the money, as the obligors could discharge the bond by accepting the tender of five thousand five hundred dollars and interest, and then paying the penal sum of five thousand five hundred dollars to the obligees. — *Kleinschmitt v. Kleinschmidt*, 477.
2. Defendants had agreed with plaintiffs to relocate a disputed mining claim, for the purpose of defeating a suit by the prior claimant affecting the titles of plaintiffs to certain lots, the expenses incident thereto to be shared proportionately, and upon a successful termination of the suit each lot owner to receive a conveyance of his share of the disputed and relocated claims. Money was collected and expended to the knowledge of the defendants, they receiving a part of it, and asserting that they did so for the lot owners. The attorney for the defendants prepared the contract, and it was read over to one of the defendants and signed by him after one of the lot owners assented to its correctness, and afterwards signed by the rest of the defendants. In an action for specific performance the defendants pleaded a mistake discovered two years prior, but which they had never before claimed, and which they did not attempt to account for on the trial. *Held*, that the contract would not be reformed on the ground of mistake. — *Fitschen v. Thomas*, 52.

STATE CONTRACTS.

The executory contracts of a State, as its promises to pay for services rendered under agreements authorized by law, have no legal obligation. They depend upon good faith for their performance, and cannot be enforced at law. — *State ex rel. Journal Publishing Company v. Kenney*, 389.

TOWN SITE.**STATE OFFICERS.**

See MANDAMUS, 1; CONSTITUTIONAL LAW, 1.

STATEMENT.

See PRACTICE, 1, 2, 4, 10; PRACTICE, CRIMINAL, 8.

STATUTORY CONSTRUCTION.

See NOTARY PUBLIC, 1; CONTRACTS, 2; MECHANIC'S LIEN, 2; CONSTITUTIONAL LAW, 3, 6, 7; MARRIED WOMEN, 1; MINES AND MINERAL LANDS, 5; PUBLIC PLACE, 1; GRAND JURY, 1, 2.

1. The compensation of members of the legislative assembly is fixed by law (Const. art. v. § 5) and the duty of the State auditor as defined by section 121, fifth division of the Compiled Statutes, is therefore not affected by the provisions of section 20, article vii. of the Constitution, creating a board of examiners, and providing that "no claims against the State, except salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board."—*State ex rel. Thompson v. Kenney*, 223.
2. A claim against a county for the repayment of taxes paid under protest is an "account" within the meaning of sections 762 and 784, fifth division, Compiled Statutes.—*Powder River Cattle Company v. Commissioners of Custer County*, 145.

SUBCONTRACTOR.

See MECHANIC'S LIEN, 1.

SUBPOENA.

See ELECTIONS, 6, 10.

SUCCESSIVE PROSECUTIONS.

See PRACTICE, CRIMINAL, 8.

SUMMONS.

See JUSTICE'S COURT, 1.

TESTAMENTARY DISPOSITION.

See WILLS, 1.

THREATS.

See EVIDENCE, CRIMINAL, 1, 6, 12.

TITLE.

See EJECTMENT, 1, 2.

TOWN SITE.

1. An act of Congress provides for the transfer of the title to a town site to the probate judge of the county wherein such town may be situated, in trust for its occupants. Under the laws of the late Territory, passed to give effect thereto, such probate judge is charged with certain duties which involve the hearing and consideration of testimony concerning the rights of claimants to any lots, and passing upon its competency, credibility, and weight, and which also involve judicial trials before him in certain instances, wherein he is required to

render judgments, from which appeals may be prosecuted to the Supreme Court of the Territory. *Held*, that the trust position of the probate judge in these matters is *quasi-judicial*. (*Ming v. Truett*, 1 Mont. 325, overruled; *Edwards v. Tracy*, 2 Mont. 49; *Schnepel v. Mellen*, 3 Mont. 118; *City of Helena v. Albertose*, 3 Mont. 499, reviewed and distinguished.) — *Ming v. Foote*, 201.

2. The deed of a probate judge, of lots in the town site of which such judge is the trustee, is conclusive when brought to notice in a collateral proceeding, and is unassailable in the legal action of ejectment, where no equitable defense or cross-demand is set up. — *Id.*

TRESPASS.

See UNENCLOSED LANDS, 1.

TRIAL.

Where the defendant, in a criminal trial, at the close of the case for the State, asks for an instruction to acquit, and the jury, though instructed that they may find a verdict of not guilty, return a verdict of guilty, he has had a trial as contemplated by law, though he lost his opportunity to testify by submitting his case to the jury upon the supposed failure of the prosecution, and cannot be released on habeas corpus. Irregularities in the verdict and judgment cannot be reviewed on habeas corpus. — *In re Thompson*, 381.

TRUSTEE.

See TOWN SITE, 1.

UNENCLOSED LANDS.

See INSTRUCTIONS, 3.

There can be no recovery for damages sustained to the owner of unenclosed lands by reason of sheep straying or being driven thereupon and destroying the grass and verdure, unless it appear that they were maliciously driven upon such lands for the purpose of causing injury. — *Fant v. Lyman*, 61.

VARIANCE.

See EVIDENCE, CRIMINAL, 5; CRIMINAL LAW, 5.

VERDICT.

See DAMAGES, 1; APPEAL, 6.

After a verdict is rendered and recorded and the jury discharged, the province of the jury is exhausted, and the verdict cannot then be changed in substance though the court has the power to amend it as to informalities. — *In re Thompson*, 381.

VERIFICATION.

See MINES AND MINERAL LANDS, 1, 2.

VOTING.

See ELECTIONS.

WAIVER.

See JUSTICE'S COURT, 1.

WARRANTY.

1. No form of words is essential to constitute an express warranty in the sale of chattels. — *Kircher v. Conrad*, 191.
2. In sales of personal property on inspection, without express warranty, where the vendor's means of knowledge are no greater than those of the vendee, there is no implied warranty on the part of the vendor that the article sold is of the species contemplated by the parties, and the rule of *caveat emptor* applies. — *Id.*
3. Plaintiff looked at some wheat in defendants' store, and asked what kind it was, stating that he wanted to buy spring wheat. Defendant and one T., a clerk, said they did not know, but would write and find out. Some months later, plaintiff went into the store and said to T., who was in charge of defendants' business: "How about that wheat, have you an answer yet?" T. said: "We have; it is spring wheat. We have just got a car load of it." Plaintiff said: "Are you sure it is spring wheat?" T. replied: "What do you take me for?" *Held*, that the words used by T. in reply to plaintiff's questions did not constitute a warranty that the grain was spring wheat. *Held*, also, that T. had the power under his employment to make an express warranty of the quality of the grain had plaintiff required it. — *Id.*
4. Cattle running on the public ranges are in the constructive possession of the owner, and upon a sale thereof a warranty of title will be implied. — *Budd v. Power*, 99.

WILLS.

In the case at bar the testator devised to his wife all of the personal estate and one half of all mining property. After the making of the will he executed with his wife a deed in escrow of certain mining property, with a contract for its delivery upon the payment of the specified purchase price. After the death of the testator, and before the expiration of the contract, the grantee of the deed made the necessary payment and received the deed. *Held*, that under sections 461 and 463 of the Probate Practice Act, providing in substance that an agreement by a testator for the sale of property disposed of by will previously made does not revoke such disposal, but the property passes by the will, subject to specific performance against the devisees, and that a conveyance or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, the execution of the deed and contract did not amount to a divestiture of the title of the testator, but that the title passed to the devisees, subject to the conditions so placed upon it, and the divestiture was consummated upon the performance of the condition and the second delivery. — *Chadwick v. Tatem*, 254.

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